Supreme Court, U.S.
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No. (1) 09-1276

In The

Supreme Court of the United States

JOSEPH QUIGLEY, et al.,

Petitioners,

vs.

ESQUIRE DEPOSITION SERVICES, LLC,

Respondent.

On Petition For A Writ Of Certiorari To The Superior Court Of New Jersey, Appellate Division

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

1. Do the Federal Rules of Civil Procedure, which do not govern deposition transcript formatting, nevertheless preempt the States from protecting consumers by regulating the format of transcripts of local federal depositions?

LIST OF PARTIES

In addition to the Petitioner, individually and on behalf of all others similarly situated, and the Respondent, a list of all parties to the proceedings in the court whose judgment is the subject of this petition is as follows:

The New Jersey State Board of Court Reporting intervened below, supporting Petitioner's position.

The Certified Shorthand Reporters of New Jersey, Inc., appeared as an amicus curiae, supporting Petitioner.

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the Superior Court of New Jersey, Appellate Division, at Docket A-001254-08T3.

OPINIONS BELOW

The decision of the New Jersey Supreme Court declining to review the case appears at App. 79 to the Petition and is reported at ___ N.J. ___, 988 A.2d 1177.

The opinion of the New Jersey Appellate Division dated August 12, 2009 appears at App. 1 to the Petition and is reported at 409 N.J. Super. 69, 975 A.2d 1042 (2009).

The opinion of the New Jersey Appellate Division dated May 19, 2008 appears at App. 21 to the Petition and is reported at 400 N.J. Super. 494, 948 A.2d 665 (2008).

The opinion of the New Jersey Superior Court dated September 26, 2008 appears at App. 19 to the Petition and is unpublished.

The opinion of the New Jersey Superior Court dated September 6, 2006 appears at App. 40 to the Petition and is unpublished.

JURISDICTIONAL STATEMENT

The Order of the Supreme Court of New Jersey denying certification (App. 79) was filed on January 21, 2010. This Petition therefore will be timely if filed no later than April 21, 2010.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, Article VI, Clause 2, United States Constitution, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Federal Rule of Civil Procedure, Rule 28, provides:

> Rule 28. Persons Before Whom Depositions May Be Taken
>
> (a) Within the United States.
>
> (1) In General. Within the United States or a territory or insular possession subject to

United States jurisdiction, a deposition must be taken before:

(A) an officer authorized to administer oaths either by federal law or by the law in the place of examination; or

(B) a person appointed by the court where the action is pending to administer oaths and take testimony.

(2) Definition of "Officer". The term "officer" in Rules 30, 31, and 32 includes a person appointed by the court under this rule or designated by the parties under Rule 29(a).

(b) In a Foreign Country.

(1) In General. A deposition may be taken in a foreign country:

(A) under an applicable treaty or convention;

(B) under a letter of request, whether or not captioned a "letter rogatory";

(C) on notice, before a person authorized to administer oaths either by federal law or by the law in the place of examination; or

(D) before a person commissioned by the court to administer any necessary oath and take testimony.

(2) Issuing a Letter of Request or a Commission. A letter of request, a commission, or both may be issued:

(A) on appropriate terms after an application and notice of it; and

(B) without a showing that taking the deposition in another manner is impracticable or inconvenient.

(3) Form of a Request, Notice, or Commission. When a letter of request or any other device is used according to a treaty or convention, it must be captioned in the form prescribed by that treaty or convention. A letter of request may be addressed "To the Appropriate Authority in [name of country]." A deposition notice or a commission must designate by name or descriptive title the person before whom the deposition is to be taken.

(4) Letter of Request – Admitting Evidence. Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States.

(c) Disqualification. A deposition must not be taken before a person who is any party's relative, employee, or attorney; who is related to or employed by any party's attorney; or who is financially interested in the action.

The New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq., provides:

> **56:8-2.** The act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid, whether or not any person has in fact been misled, deceived or damaged thereby, is declared to be an unlawful practice; provided, however, that nothing herein contained shall apply to the owner or publisher of newspapers, magazines, publications or printed matter wherein such advertisement appears, or to the owner or operator of a radio or television station which disseminates such advertisement when the owner, publisher, or operator has no knowledge of the intent, design or purpose of the advertiser.

The New Jersey Administrative Code, at the time the action arose, provided, in pertinent part:

> **13:43-5.9. Transcript format.**
>
> (a) A certified court reporter or temporary registered reporter shall follow the following transcript format:

1. No fewer than 25 typed lines of transcript shall be on a standard 8½ inch by 11 inch paper not inclusive of the header or footer of a page;

2. Each line shall contain no fewer than nine letters and/or spaces per typed inch, and no less than 52 letters and/or spaces per line;

3. Each question and answer shall begin on a separate line;

4. Each question shall begin no more than seven spaces from the left hand margin with no more than seven spaces from the "Q" and "A" to the text;

5. The carry over "Q" and "A" text shall begin at the left hand margin;

6. The colloquy material shall begin no more than 15 spaces from the left hand margin with the carry over colloquy to begin at the left hand margin;

7. Quoted material shall begin no more than 15 spaces from the left hand margin, and carry over lines shall begin no more than 10 spaces from the left hand margin; and

8. Parentheticals and exhibit markings shall begin no more than 15 spaces from the left hand margin, with the carry over

lines beginning no more than 10 spaces from the left hand margin.

STATEMENT OF THE CASE

A. Procedural history.

Invoking the New Jersey Consumer Fraud Act, your Petitioner, Joseph Quigley, brought a class action against the Respondent, Esquire Deposition Services, LLC ("Esquire"), suing on behalf of himself and all others similarly situated, and in particular, all persons who received billings from Esquire for [New Jersey] deposition transcripts at which Esquire did not conform to the minimum format requirements of N.J.A.C. 13:43-5.9(a). Esquire raised the federal question here at issue when it moved to dismiss the unanswered Complaint, contending *inter alia* that the Federal Rules of Civil Procedure pre-empt New Jersey law in all matters relating to federal deposition transcripts. App. 40. Rejecting Mr. Quigley's position, the trial court held that the Complaint stated a Consumer Fraud Act claim upon which relief otherwise can be granted, but that the claim must fail because of federal pre-emption. App. 42.

The Appellate Division of Superior Court remanded, holding that the New Jersey regulations governing deposition transcript formatting were pre-empted by the federal rules, but that plaintiff could replead to state a claim not dependent upon the

regulations. 400 N.J. Super. 494, 948 A.2d 665 (2008). App. 21.

On remand, the trial court again dismissed, holding that the Amended Complaint's references to competitors' conduct necessarily implicated the supposedly pre-empted New Jersey regulations because the competitors' conduct was governed by the State regulations.[1] App. 38.

Mr. Quigley appealed again. He also moved to recall the mandate of the first appellate decision, contending that "the United States Supreme Court's supervening decision in *Altria Group, Inc. v. Good*, 129 S.Ct. 538 (2008), makes clear that [the Appellate Division]'s pre-emption analysis, reported at 400 N.J. Super. 494 (2008), is flawed and no federal pre-emption applies." This motion was denied without explanation. See App. 17.

The Appellate Division thereafter affirmed the trial court's dismissal of the Amended Complaint on remand, reiterating that the Federal Rules of Civil Procedure occupy the entire field and therefore pre-empt the State's shorthand reporter regulations. 409 N.J. Super. 69, 975 A.2d 1042 (2009). App. 1.

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[1] Under the trial court's pre-emption holdings, competitors transcribing federal depositions would not be subject to the Board's transcript formatting regulations. Nevertheless, all of Esquire's competitors, including stenographers employed by the official federal court reporters, adhered to the State formatting regulations when transcribing federal depositions.

Mr. Quigley sought review of that pre-emption holding in the New Jersey Supreme Court by way of certification. On January 21, 2010 (App. 79), certification was denied. This Petition followed.

B. Factual statement.

Opposing counsel, in unrelated litigation, retained your Respondent, Esquire, to transcribe the deposition testimony of your Petitioner, Joseph Quigley, on two separate days in a proceeding venued in the United States District Court for the District of New Jersey. Those depositions were conducted within New Jersey (where Esquire is headquartered), in a private building rather than in a federal enclave.

Esquire sold the original and first copy of the transcripts to the retaining counsel's client. Esquire later provided to Mr. Quigley's attorney second copies of the two transcripts, together with a bill.

When Mr. Quigley's attorney examined the transcripts, he found they were printed in unusually large fonts, yielding only six characters per inch in one transcript, and seven characters per inch in the other, while New Jersey regulations require nine characters per inch. N.J.A.C. 13:43-5.9(a)(2). New Jersey, by regulation, requires at least 52 letters and/or spaces per line, while the transcripts only contained 41 letters and/or spaces per inch. N.J.A.C. 13:43-5.9(a)(2). Each transcript had at least one inch of spacing before each Q or A, while New Jersey allows no more than seven-ninths of an inch. N.J.A.C. 13:43-5.9(a)(4).

Esquire printed only 24 transcript lines per page, when New Jersey requires 25 transcript lines. N.J.A.C. 13:43-5.9(a)(1).

Esquire billed for the transcript copies by the page.[2] Because Esquire's non-conforming formatting dramatically inflated the number of pages, Esquire's nominal $2.65 per page charge plus a 3% service charge was tantamount to charging about $4.00 per page had the transcript formatting conformed to New Jersey regulations. Yet Esquire's incremental cost for producing the transcript second copies was less than $0.10 per page.

C. Petitioner's legal claims.

The New Jersey Consumer Fraud Act has been definitively construed to provide strict liability for any violation of any regulation promulgated under the Act. See *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 18-19, 647 A.2d 454 (1994). The New Jersey Board of Shorthand Reporters is a component of the New Jersey Division of Consumer Affairs. The Division of Consumer Affairs enforces the Consumer Fraud Act. Accordingly, plaintiff maintained that Esquire, by violating the Board's transcript formatting regulations (and other regulations not immediately relevant), violated the Act.

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[2] Esquire also billed blank non-transcript pages, such as "LAWYERS NOTES," and "ERRATA," as transcript pages.

Petitioner's Complaint and Amended Complaint asserted that Esquire violated the Consumer Fraud Act both by violating various New Jersey regulations, including the formatting regulations, and by charging an exorbitant price[3] for the transcript copies. The decision below holds that the New Jersey regulations are pre-empted by the Federal Rules of Civil Procedure, and overpricing, without more, is an allowed feature of capitalism.

REASONS FOR GRANTING THE PETITION

A. Pre-emption disputes invariably present a substantial federal question.

Certiorari is only granted when a petition presents a substantial federal question. Federal pre-emption of State interests arises only under the Supremacy Clause, and therefore every pre-emption dispute necessarily presents a substantial federal question.

The substantiality of the federal question is made clear by the classic statement of supremacy's force set

[3] The Consumer Fraud Act condemns unconscionable pricing. Thus, *Kugler v. Romain*, 58 N.J. 522, 279 A.2d 640 (1971), enjoined a sales scheme which ultimately charged exorbitant prices for items of little if any value. 58 N.J. at 528, 529 (cash price $249.50, installment price, $279.95; wholesale price, $35 to $40).

out in *McCulloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 436 (1819) (Marshall, C.J.):

> The States have no power, by taxation or otherwise, to retard, impede, burden, or in any manner control, the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the general government.

Accordingly, pre-emption can be imposed only where a state enactment, regulation, or rule of decision, would unavoidably impair a federal function or impede the operation of a federal enactment.

B. The scope of pre-emption is limited to the need to carry out the laws of Congress.

Pre-emption rulings inevitably determine the degree to which Congress can limit the traditional powers of the States. Pre-emption is generally disfavored precisely because it trenches on State sovereignty.

"Federal regulation . . . should not be deemed pre-emptive of State regulatory powers in the absence of persuasive reasons – either that the nature of the regulated subject permits no other conclusion, or that the Congress has unmistakably so ordered." *Florida Lime & Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963). Courts must "assum[e] that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *California Div. of Labor*

Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 325 (1997).

C. Pre-emption of State consumer fraud laws is especially disfavored.

This Court recently surveyed the law of pre-emption in *Altria*, *supra*, 129 S.Ct. at 533 (2009) (State consumer fraud act not pre-empted by federal enactment) in the following language (citations omitted):

> Our inquiry into the scope of a statute's pre-emptive effect is guided by the rule that "'[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case." Congress may indicate pre-emptive intent through a statute's express language or through its structure and purpose. If a federal law contains an express pre-emption clause, it does not immediately end the inquiry because the question of the substance and scope of Congress' displacement of state law still remains. Pre-emptive intent may also be inferred if the scope of the statute indicates that Congress intended federal law to occupy the legislative field, or if there is an actual conflict between state and federal law. When addressing questions of express or implied pre-emption, we begin our analysis "with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." That assumption applies with particular force when

> Congress has legislated in a field traditionally occupied by the States.

Fraud upon consumers, as *Altria* teaches, is a field traditionally occupied by the States. *Altria* was not breaking new ground on this point, for more than a century earlier this Court held that a State law intended to prevent fraud and deception by forbidding commerce in imported adulterated coffee beans was not pre-empted by the Pure Food & Drug Act. *Crossman v. Lurman*, 152 U.S. 189, 199 (1904).

D. New Jersey's formatting regulations define a species of fraudulent commercial conduct which Congress never intended to pre-empt.

Altria, *supra*, establishes that State consumer fraud protections will not be deemed pre-empted except upon a clear showing that Federal functioning will be impeded. No such showing was or could have been made in the courts below.

There exists no rational basis for concluding that in adopting the Rules of Civil Procedure, Congress intended to limit State protection of consumers from fraud. Yet protection of consumers from fraud is the sole function of N.J.A.C. 13:43-5.9(a). Hence this case is *à fortiori* to Altria.

Notably, Esquire claims to transcribe millions of pages every year. Esquire's abusive practices generate tens of millions of revenue dollars each year. Because transcripts are priced by the page, Esquire's employment of oversized fonts, excessive spacing, and

fewer lines per page than New Jersey regulations require inevitably shortchanges the buyer of a New Jersey deposition transcript and unjustly enriches Esquire.[4]

Curtailing fraud is a traditional State function. As *Altria* makes clear, pre-emption of State consumer fraud enactments is not permitted unless the state law would necessarily frustrate a clearly articulated federal objective. See also *Crossman*, *supra*.

Even in the case of immigration policy, where field pre-emption is beyond dispute, State enactments which do not frustrate the federal interest are not pre-empted. For example, *De Canas v. Bica*, 424 U.S. 351 (1976), rejected the proposition that by enacting the Immigration & Naturalization Act, Congress precluded the States from barring employment of illegal aliens. "[W]e will not presume that Congress, in enacting the INA, intended to oust state authority to regulate the employment relationship covered by [Calif. Labor Code] § 2805(a) in a manner consistent with federal laws." *De Canas*, 424 U.S. at 357.

No federal interest can possibly be frustrated by applying New Jersey's transcript formatting regulations to federal depositions venued in New Jersey. Congress has adopted no transcript formatting

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[4] The Court's decision below leaves consumers without any effective remedy, since the amounts in controversy are too small to economically justify Federal Court proceedings, and when Esquire brings a collection suit in State Court, the consumer is without recourse to file a State Law counterclaim.

standards, and a transcript's format cannot possibly alter the testimony transcribed.

E. None of the recognized species of pre-emption finds support in the present record.

Pre-emption comes in three varieties: Express, implied and field. The decision below found field pre-emption, but no pre-emption is warranted.

1. Express pre-emption.

Express pre-emption arises when Congress has specified a particular rule of law. When looking for express pre-emption, courts start with the enactment's "plain wording," *Sprietsma v. Mercury Marine*, 537 U.S. 51, 62 (1993), and then "identify the domain expressly pre-empted by that language." *Medtronic, Inc. v. Lohr*, 528 U.S. 470, 484 (1996) (internal quotation marks and citations omitted).

The plain wording of the Federal Rules of Civil Procedure simply does not address formatting of deposition transcripts. Nothing in the Rules of Civil Procedure even hints at, much less dictates, statutory standards for formatting federal deposition transcripts.

Congress' purpose cannot possibly be frustrated when Congress has been absolutely silent about formatting standards. Hence there certainly is no express pre-emption here.

2. Implied conflict pre-emption.

Implied pre-emption typically arises when there is a conflict between a federal and a State requirement, making it "impossible for a private party to comply with both state and federal requirements." *English v. General Electric Co.*, 496 U.S. 72, 78-79 (1990).

Implied pre-emption is not in issue here because the transcriber is not required to honor conflicting State and federal formatting standards. No such conflict is possible because no federal statute or rule establishes a standard for formatting of a federal deposition transcript. Hence there certainly is no implied conflict pre-emption.

3. Field pre-emption.

Field pre-emption arises by implication when a "field reserved for federal regulation" is occupied by State law. *Sprietsma*, *supra*, 537 U.S. at 69. Whether a State law poses an obstacle to Congressional objectives, as must be the case in field pre-emption, "is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 373 (2000).

The New Jersey courts overlooked this *Crosby* teaching. Because of that, those courts overstated the scope of Federal Rules of Civil Procedure field

pre-emption and mistakenly extended the pre-emption to transcript formatting.

The Federal Rules of Civil Procedure undoubtedly pre-empt the fields of federal pleading, trial preparation, motion practice, trials, and post-trial activities. But examination of the "purpose and intended effects" of the Federal Rules of Civil Procedure, as *Crosby* requires, yields no "persuasive reason," within the meaning of *Florida Lime*, *supra*, upon which to erect a pre-emption of New Jersey's transcript formatting rules.

Put bluntly, the "purpose" of the Federal Rules does not extend to transcript formatting because regardless of how a transcript is formatted, the substance of the testimony would not be altered; likewise, the formatting of a deposition transcript to be used in a federal proceeding would neither expand nor diminish the usefulness of that transcript.

So, too, the "intended effects" of the Federal Rules of Civil Procedure can in no way be hampered by State regulation of transcript formatting, since Congress chose not to regulate transcript formatting in any way.

Thus, any examination of the Federal Rules of Civil Procedure "as a whole," and of their "purpose and intended effects," as *Crosby* requires, compels the conclusion that the States are free to adopt transcript formatting standards for federal depositions without in any way running afoul of the Federal Rules of Civil Procedure.

Congress' concern, and hence the outside limit of federal pre-emption, extends only to the reliability and potential uses of deposition testimony. Nowhere has Congress expressed a concern about how transcribed deposition testimony happens to be formatted. Thus, for purposes of applying the Federal Rules, it does not matter what type size is used, nor how many characters per line or lines per page the transcriber selects. However a deposition transcript happens to be formatted, it can always be used in the federal courts in any way that Congress contemplated.

Accordingly, this is not a case where "the purpose of the [Federal Rules of Civil Procedure] cannot otherwise be accomplished," or "its provisions refused their natural effect." *Crosby*, *supra*, 530 U.S. at 373. Thus, the precedents establish that the Federal Rules of Civil Procedure provide no support whatsoever for a field pre-emption of State transcript formatting requirements.

F. The decisions below are in direct conflict with this Court's pre-emption holdings.

"'The purpose of Congress is the ultimate touchstone' in every pre-emption case." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (quoting *Retail Clerks v. Schermerhorn*, 375 U.S. 96, 103 (1963)). Precisely because formatting cannot possibly have any impact

upon the validity or judicial use of any transcript, there is no proper basis for concluding that the purpose of Congress was to control the formatting of federal deposition transcripts. The New Jersey courts therefore fell into direct conflict with the "touchstone" rule by holding that the Federal Rules of Civil Procedure occupy a larger field than Congress ever chose to occupy.

Applying New Jersey formatting requirements to a federal deposition transcript taken within New Jersey for use in the District of New Jersey is fully consistent with the Federal Rules of Civil Procedure. Put bluntly, under this Court's precedents, there cannot possibly be field pre-emption, as Congress has never entered the field of transcript formatting.

Put differently, New Jersey's transcript formatting regulation, as applied to federal deposition transcripts, presents no "obstacle to the full accomplishment of Congress's objectives," *Crosby*, *supra*, 530 U.S. at 374 n.8, in adopting the Federal Rules of Civil Procedure. Therefore the State regulation at issue cannot be pre-empted.

The holding below, that duly promulgated New Jersey regulations governing transcript formatting are somehow pre-empted for federal deposition transcripts by the Federal Rules of Civil Procedure, appears to be in patent conflict with this Court's Supremacy Clause jurisprudence. To resolve that conflict, a writ of certiorari should issue to determine

whether New Jersey's transcript formatting regulations are pre-empted with respect to the formatting of federal deposition transcripts.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to determine whether the August 12, 2009 decision of the Superior Court of New Jersey, Appellate Division, at Docket No. A-001254-08T3, is in conflict with this Court's Supremacy Clause jurisprudence.

Respectfully submitted,

ALAN H. SCHORR
FREDRIC J. GROSS
Attorneys for Petitioner

April 20, 2010.

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1254-08T3

JOSEPH QUIGLEY, individually and on behalf of all others similarly situated,

Plaintiff-Appellant,

v.

ESQUIRE DEPOSITION SERVICES, LLC,

Defendant-Respondent.

APPROVED FOR PUBLICATION

August 12, 2009

APPELLATE DIVISION

Argued June 2, 2009 – Decided August 12, 2009

Before Judges Skillman, Graves and Grall.

On appeal from Superior Court of New Jersey, Law Division, Burlington County, Docket No. L-2238-08.

Fredric J. Gross argued the cause for appellant (Alan H. Schorr & Associates and Mr. Gross, attorneys; Mr. Gross, of counsel; Mr. Schorr, on the briefs).

Kenneth J. Wilbur argued the cause for respondent (Drinker, Biddle & Reath, attorneys; Mr. Wilbur and Tonia Ann Patterson, on the brief).

The opinion of the court was delivered by

SKILLMAN, P.J.A.D.

This case is before us for the second time. As recounted in our prior opinion, *Quigley v. Esquire Deposition Service[s], LLC,* 400 *N.J. Super.* 494, 498-99 (App. Div. 2008), plaintiff was a party to litigation in the United States District Court for the District of New Jersey. During that litigation, plaintiff's adversary took his deposition in New Jersey. Plaintiff's adversary contracted with defendant Esquire Deposition Services to transcribe the deposition. Since the *Federal Rules of Civil Procedure* do not require a reporter who transcribes a deposition to furnish a copy to the other parties, plaintiff through his attorney ordered a transcript of his two-day deposition from defendant, which charged him a total of $1,251.55. Subsequently, the federal litigation to which plaintiff had been a party was settled.

Plaintiff brought this action claiming that defendant violated the New Jersey statute and administrative regulations governing shorthand reporting in transcribing his deposition and charging him for a copy. In addition, plaintiff claimed that defendant violated the Consumer Fraud Act, *N.J.S.A.* 56:8-1 to -20, by unconscionable and fraudulent practices in billing him for a copy of his deposition. Plaintiff sought class certification of the complaint.

Defendant moved to dismiss plaintiff's complaint for failure to state a claim. The motion judge concluded that the statute and administrative regulations

requiring a deposition to be transcribed by a certified shorthand reporter and the regulations prescribing formatting standards for deposition transcripts do not apply to depositions taken in connection with federal litigation because they are pre-empted by the *Federal Rules of Civil Procedure.* Consequently, the judge dismissed plaintiff's claims predicated on the statute and regulations. The motion judge, apparently conceiving that plaintiff's Consumer Fraud Act claims were entirely dependent upon the applicability of the statute and regulations governing shorthand reporting, also dismissed those claims.

On the first appeal, we upheld the motion judge's conclusion that the *Federal Rules,* which allow a non-certified stenographic reporter to transcribe a deposition taken in connection with federal litigation, pre-empt the New Jersey statute and regulations governing shorthand reporting, which require a deposition to be transcribed either by a certified court reporter or a non-certified reporter under stringent limitations set forth in the New Jersey regulations. *Quigley, supra,* 400 *N.J. Super.* at 499-505. We also held that this federal pre-emption extends to any state regulation of the price a stenographic reporter may charge for a transcript taken in connection with federal litigation. *Ibid.* Accordingly, we affirmed the dismissal of plaintiff's claims that were based on the New Jersey statute and regulations governing shorthand reporting. *Id.* at 507.

However, we concluded that three counts of plaintiff's complaint "state[d] claims that rest partly

on the statute and regulations governing shorthand reporting but also may be read to state [Consumer Fraud Act] claims that can stand independently of those statutes and regulations." *Ibid.* In addition, we held that "the *Federal Rules of Civil Procedure* were [not] intended to pre-empt application of state consumer fraud statutes to fraudulent or deceptive business practices of a shorthand reporting company." *Id.* at 406. Based on this holding, we concluded that "to the extent plaintiff's complaint may be read to state claims under the Consumer Fraud Act that are not dependent upon the New Jersey statutes and administrative regulations governing shorthand reporting, it is not subject to federal pre-emption." *Ibid.* Accordingly, we reversed the dismissal of the counts of plaintiff's complaint that could be read to state such claims. *Id.* at 507. We also granted plaintiff leave to file an amended complaint that would restate those claims in a form that was not dependent upon the New Jersey statute and regulations governing shorthand reporting. *Ibid.*

Upon remand, plaintiff filed an amended complaint, as authorized by our prior opinion. Defendant again moved to dismiss for failure to state a claim. The trial court granted the motion for the reasons set forth in an oral opinion, which stated in part:

> Count One in my view, . . . restates the State regulations as an industry standard and alleges that anything that doesn't comply is an unconscionable commercial practice. It's dependent then on the Statute and

> regulations that the Appellate Division found to be preempted[.]
>
> Is it expressly doing that, no. Is it doing it . . . under the term unconscionable commercial practice, yes, it is. I believe if I allow this to go forward like this that the defendant is just defending against the regulations . . . the same as if the Appellate Division had not ruled the way that they [did].
>
> Same with Count Two; basically, the copying charges, what the plaintiff is saying copying charges are too high, so they say that they're unconscionable, and they arrive at that by comparing those charge costs to other photocopying costs from other sources, but . . . the reasonableness of rates is an issue that's preempted.
>
> Basically, if I allow this again . . . through this State Court action I'm setting a level that's reasonable or at least I'm defining what's unreasonable and that's the province of the Federal Court and the . . . Federal rules.

On appeal, plaintiff argues that his amended complaint stated viable claims under the Consumer Fraud Act that are not dependent upon the New Jersey statute and regulations governing shorthand reporting. In addition, plaintiff argues that the Supreme Court's opinion in *Altria Group, Inc. v. Good*, ___ *U.S.* ___, 129 *S. Ct.* 538, 172 *L. Ed.* 2d 398 (2008), requires reconsideration of our prior opinion's

holding that the *Federal Rules of Civil Procedure* pre-empt the New Jersey statute and regulations governing shorthand reporting with respect to the taking of depositions in connection with federal litigation. We reject both arguments and affirm the dismissal of plaintiff's amended complaint.

I.

Initially, we consider plaintiff's argument that *Altria* requires reconsideration of our prior opinion's holding that the *Federal Rules* are pre-emptive with respect to a deposition taken in connection with federal litigation. Plaintiff first raised this argument in his reply brief. We do not ordinarily consider an argument that is raised for the first time in a reply brief. *See Berlin v. Remington & Vernick Eng'rs,* 337 *N.J. Super.* 590, 596 (App. Div.), *certif. denied,* 168 *N.J.* 294 (2001). However, *Altria* was decided only two weeks before plaintiff filed his initial brief. Moreover, defendant was afforded an opportunity to respond to this argument by means of its brief in response to plaintiff's motion to recall the mandate incorporated in our prior opinion. Therefore, we address the merits of this argument.

In *Altria,* the Court held that the Federal Cigarette Labeling and Advertising Act did not pre-empt a claim under the Maine Unfair Trade Practices Act that a cigarette company's advertising fraudulently conveyed the message that a "light" cigarette delivers less tar and nicotine than a regular brand.

___ *U.S.* at ___, 129 *S. Ct.* at 541, 172 *L. Ed.* 2d at 403. In reaching this conclusion, the Court did not adopt any new doctrinal principles for consideration of federal pre-emption claims. The Court simply applied well-established principles – including that "'[t]he purpose of Congress is the ultimate touchstone' in every pre-emption case," ___ *U.S.* at ___, 129 *S. Ct.* at 543, 172 *L. Ed.* 2d at 405 (quoting *Medtronic, Inc. v. Lohr,* 518 *U.S.* 470, 485, 116 *S. Ct.* 2240, 2250, 135 *L. Ed.* 2d 700, 716 (1996)), that "Congress may indicate pre-emptive intent [either] through a statute's express language or [by inference] through its structure and purpose," *ibid.,* and that a court should be particularly reluctant to find pre-emption "when Congress has legislated in a field traditionally occupied by the States," ___ *U.S.* at ___, 129 *S. Ct.* at 543, 172 *L. Ed.* 2d at 406 – to the specific pre-emption issue presented in *Altria.*

Thus, nothing in *Altria* affects our prior opinion's holding that "in adopting the *Federal Rules,* the Supreme Court intended to deal comprehensively with the taking of depositions in connection with federal litigation, 'thus occupying [the] entire field of regulation and leaving no room for the states to supplement [that] federal law[.]'" 400 *N.J. Super.* at 502 (quoting *Louisiana Pub. Serv. Comm'n v. FCC,* 476 *U.S.* 355, 368, 106 *S. Ct.* 1890, 1898, 90 *L. Ed.* 2d 369, 382 (1986)). Indeed, *Altria's* only possible relevancy to this case is to provide further support for our other holding – that the *Federal Rules* do not "pre-empt the application of state statutes prohibiting fraudulent or

deceptive business practices," and "[t]herefore, to the extent plaintiff's complaint may be read to state claims under the Consumer Fraud Act that are not dependent upon the New Jersey statutes and administrative regulations governing shorthand reporting, it is not subject to federal pre-emption." 400 *N.J. Super.* at 506.

The state statute involved in *Altria* imposed a duty upon the defendant "not to deceive," regardless of the particular area of endeavor that is federally regulated. *See Altria, supra,* ___ *U.S.* at ___, 129 *S. Ct.* at 545, 172 *L. Ed.* 2d at 408. Similarly, the New Jersey Consumer Fraud Act prohibits fraudulent or deceptive business practices, regardless of the type of merchandise or service that is being sold. In contrast, the New Jersey statute and regulations governing stenographic reporting services contain detailed provisions relating to the qualifications of a person before whom a deposition may be taken, how a deposition may be recorded and how transcripts must be formatted. *See Quigley, supra,* 400 *N.J. Super.* at 500-01. We remain convinced for the reasons set forth in our prior opinion that those provisions, as applied to a deposition taken in connection with federal litigation, are pre-empted by the *Federal Rules. Id.* at 502-05.

II.

Before considering whether plaintiff's amended complaint states a claim under the Consumer Fraud

Act, we make two preliminary observations regarding our prior opinion.

First, the primary focus of that opinion, as set forth in its first sentence, was on "whether, as applied to a deposition taken in connection with federal litigation, the *Federal Rules of Civil Procedure* pre-empt the New Jersey statute and administrative regulations governing shorthand reporting." 400 *N.J. Super.* at 497. Indeed, the trial court that dismissed plaintiff's original complaint for failure to state a claim viewed the pre-emption issue as dispositive and did not consider whether the complaint could be read to state Consumer Fraud Act claims that would stand independently of the statute and regulations governing shorthand reporting. Moreover, plaintiff's appellate briefs only obliquely suggested that his Consumer Fraud Act claims might be maintainable even if we ruled adversely to him on the pre-emption issue. In view of the subordinate role that independent Consumer Fraud Act claims played in plaintiff's presentation to us, we were guided in our prior opinion by the principle that in reviewing a motion to dismiss "a . . . court 'searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" *Id.* at 505 (quoting *Printing Mart-Morristown v. Sharp Elecs. Corp.*, 116 *N.J.* 739, 746 (1989)). However, our prior opinion granted plaintiff leave to file an amended complaint that could stand independently of the statute and

regulations governing shorthand reporting, and plaintiff took advantage of this opportunity and filed an amended complaint. Furthermore, when the trial court dismissed plaintiff's amended complaint, it left the door open to plaintiff filing another amended complaint, but plaintiff declined to do so. Therefore, we do not review plaintiff's amended complaint with the same liberality as his original complaint because it must be assumed at this stage of the litigation, after plaintiff has been given multiple opportunities to amend, that he has alleged every fact he reasonably believes could support a Consumer Fraud Act claim independent of the statute and regulations governing shorthand reporting. *See Commc'ns Workers of Am. v. Whitman*, 335 *N.J. Super.* 283, 288-90 (App. Div. 2000), *certif. denied*, 167 *N.J.* 636 (2001).

Second, our prior opinion was based on the understanding that plaintiff first paid the $1,251.55 defendant charged for copies of his deposition transcripts and then received the transcripts. *See* 400 *N.J. Super.* at 498. Our opinion also referred to plaintiff's allegations that "defendant's 'billing rate for . . . transcripts was fraudulent,'" that "defendant engaged in a 'deceptive practice' in determining its billings," and that "defendant charged an undisclosed 'administrative fee' in addition to the 'stated page rate' for the transcript of his deposition." *Id.* at 506. However, the invoices for the transcripts indicate that plaintiff received the transcripts at the same time as the invoices. Moreover, plaintiff's complaint does not allege that defendant made any representations

regarding the price of a copy of plaintiff's deposition before transmitting the transcripts. In addition, we were advised at oral argument that plaintiff only paid defendant approximately $.75 per page for the copies of his depositions, which was less than one-third the invoiced price, and that defendant did not take any action to recover the balance. Therefore, the amended complaint cannot be read to allege that plaintiff paid any additional amount for copies of his deposition transcripts based on defendant's alleged misrepresentations regarding their price.

To state a Consumer Fraud Act claim, a plaintiff must allege facts which, if proven, would establish that defendant used an "unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale of or advertisement of any merchandise." *N.J.S.A.* 56:8-2. In addition, a private plaintiff must allege that he or she suffered an "ascertainable loss of moneys or property . . . as a result of" the violation of the Act. *N.J.S.A.* 56:8-19; *see Thiedemann v. Mercedes-Benz USA, LLC*, 183 *N.J.* 234, 246-53(2005).

Our Supreme Court has recognized that "[t]he capacity to mislead is the prime ingredient of all types of consumer fraud" proscribed by the Consumer Fraud Act. *Cox v. Sears Roebuck & Co.*, 138 *N.J.* 2, 17 (1994). "[T]o constitute consumer fraud . . . the business practice in question must be 'misleading' and

stand outside the norm of reasonable business practice in that it will victimize the average consumer. . . ." *N.J. Citizen Action v. Schering-Plough Corp.*, 367 *N.J. Super.* 8, 13 (App. Div.) (quoting *Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 139 *N.J.* 392, 416 (1995), *cert. denied*, 516 *U.S.* 1066, 116 *S. Ct.* 752, 133 *L. Ed.* 2d 700 (1996)), *certif. denied*, 178 *N.J.* 249 (2003). Thus, "charging five or five-hundred dollars more for an item than the price charged by a nearby competitor" does not violate the Consumer Fraud Act. *Turf Lawnmower, supra*, 139 *N.J.* at 416.

Count one of plaintiff's amended complaint alleged that in ordering copies of the transcripts of his deposition from defendant, he

> had a reasonable expectation that [defendant] would follow the generally accepted transcribing practices of the industry, and that [defendant] would not take unreasonable advantage of the plaintiff by inflating the font size, margins, and spacing beyond generally accepted practices in order to force the plaintiff to pay for more pages than would normally be required for an equally-wordy deposition.

Plaintiff further alleged that the basis for his "reasonable expectation" concerning the formatting of these transcripts was the regulations adopted by the New Jersey Board of Shorthand Reporters that our prior opinion concluded are pre-empted by the *Federal Rules* as applied to depositions taken in connection with federal litigation:

> Although [defendant] may not have been required to comply with New Jersey's Certified Transcriber rules, in that this deposition was venued in Federal Court, the certified court reporter regulations exemplify the generally accepted standards of the industry, which all reputable court reporters and transcribers in New Jersey follow, and therefore constitute the reasonable expectation of the consumer, in this case the plaintiff and other members of the class.

Plaintiff's amended complaint did not indicate any other source for his alleged "reasonable expectation" concerning the formatting. Therefore, we agree with the trial court's conclusion that count one of plaintiff's amended complaint simply constituted a backdoor attempt to resurrect one of his Consumer Fraud Act claims based on the regulations governing shorthand reporting that our prior opinion held were pre-empted.

Count two of plaintiff's amended complaint alleged that defendant's billing rate was "fraudulent and unconscionable." Plaintiff alleged that the $2.65 per page that defendant charged him for copies of his deposition transcripts was "far in excess of [defendant's] actual cost of making a xerographic copy of the original transcript, or of printing a new copy from a computerized database." Plaintiff also alleged that this charge was "far in excess of the market rate, . . . the court-specified $0.55 second copy page rate in the United States District Court for the District of New Jersey for official reporters[,] [and] . . . the copy rates

of competing stenographic services for second copies." Plaintiff further alleged that the $2.65 per page excessive rate was exacerbated by a 3% administrative fee that increased the rate to $2.7295 per page and by defendant's formatting practices that produced an overall price of what would be approximately $4 per page using other stenographic reporting companies' formatting practices. Plaintiff claims that such a charge violates the Consumer Fraud Act because it is "unconscionable."

Plaintiff relies upon *Kugler v. Romain,* 58 *N.J.* 522 (1971) in support of his argument that a seller may violate the Consumer Fraud Act by charging an "excessive price" for its product. However, the consumer fraud in *Kugler v. Romain* did not consist solely of a seller charging a consumer an allegedly excessive price. Instead, it consisted of door-to-door sales of books in poor neighborhoods by sales representatives who made numerous misrepresentations and engaged in various other deceptive practices in soliciting customers. *See* 58 *N.J.* at 527-32. The Court characterized the sale of books by such means as "predatory practices." *Id.* at 536. The Court also found that the books were "practically worthless" for their "represented purpose." *Id.* at 545. Considered within this context, the Court concluded that "the price for the book package was unconscionable in relation to defendant's cost and the value to the consumers and was therefore a fraud within the contemplation of *N.J.S.A.* 56:8-2." *Id.* at 547.

Unlike in *Kugler v. Romain,* plaintiff's amended complaint does not allege that defendant made misrepresentations to plaintiff or engaged in other deceptive practices in connection with the sale of the copies of his deposition transcripts. Indeed, as previously discussed, plaintiff does not allege that he had any communication with defendant concerning the price of the transcripts before receiving them together with the invoices.

Plaintiff has not cited any authority for his argument that a Consumer Fraud Act claim may be stated solely by an allegation that the price of a product was excessive, without consideration of the manner in which it was marketed. We live in a capitalist society in which prices are ordinarily established by the marketplace rather than by a government agency or the courts. Sellers of goods and services generally may charge whatever the market will bear so long as they do not engage in deceptive or other unfair sales practices. *See Turf Lawnmower, supra,* 139 *N.J.* at 416; *Gross v. TJH Automotive Co., L.L.C.,* 380 *N.J. Super.* 176, 187-90 (App. Div. 2005).

Plaintiff has not alleged that defendant engaged in such deceptive or unfair sales practices. Plaintiff simply ordered the transcripts of his deposition without any prior discussion of the price. When plaintiff received the invoices for the transcripts, it was within his power to refuse payment of the full amount on the ground that the charge exceeded what was "reasonable" and thus violated *Federal Rule* 30(f)(3). In fact, plaintiff followed this course and tendered defendant

less than one-third of its charge, which defendant apparently accepted. Therefore, the trial court properly dismissed the second count of plaintiff's amended complaint.

Count three of plaintiff's amended complaint alleged that defendant violated the Consumer Fraud Act by including five blank pages in the 425 pages for which he was billed $2.65 per page, one of which was used for certifications of the transcriber, two of which were marked either "ERRATA" or "LAWYER'S NOTES," and the other two of which were for a "Witness' Certification." If defendant had represented to plaintiff that he would be charged $2.65 per page for his deposition transcripts and defendant had subsequently charged him for blank pages, count three may have stated a viable claim. However, plaintiff does not allege that there was any communication between the parties regarding price when plaintiff ordered the transcripts, and the invoices do not contain any breakdown of the components of the $544.35 and $707.20 charges for the two transcripts, except for separate charges for "exhibits," "shipping and handling," and "ASCII." Consequently, plaintiff only ascertained that he had been charged for five blank pages when he inquired of defendant as to how the transcript charges had been determined. Under these circumstances, the third count of plaintiff's amended complaint does not allege any fraud or deception that could support a claim under the Consumer Fraud Act.

Affirmed.

A-1254-08 T3

ORDER ON MOTION

JOSEPH QUIGLEY
VS
ESQUIRE DEPOSITION SERVICES LLC

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO.	A-001254-08TI
MOTION NO.	M-0035777-08
BEFORE PART:	A
JUDGE(S):	SKILLMAN GRALL
MOTION FILED:	FEBRUARY 23, 2009
BY: JOSEPH QUIGLEY	
ANSWER(S) FILED:	MARCH 16, 2009
BY: ESQUIRE DEPOSITION SERVICES	
SUBMITTED TO COURT:	MARCH 26, 2009

ORDER

(Filed Apr. 1, 2009)

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS ON THIS 30th DAY OF MARCH, 2009, HEREBY ORDERED AS FOLLOWS:

MOTION BY APPELLANT

- TO RECALL MANDATE OF A-689-06 AND REINSTATE CAUSES OF ACTION DISMISSED AS PRE-EMPTED

GRANTED	DENIED	OTHER
( )	(X)	( )

SUPPLEMENTAL:

BUR L-2238-08

FOR THE COURT:

/s/ Stephen Skillman
STEPHEN SKILLMAN
P.J.A.D.

JUZSIP0

DRINKER BIDDLE & REATH LLP
A Pennsylvania Limited Liability Partnership
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Attorneys for Defendant
Esquire Deposition Services, LLC

JOSEPH QUIGLEY, individually and on behalf of all others similarly situated, Plaintiff, v. ESQUIRE DEPOSITION SERVICES, LLC, Defendant.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION BURLINGTON COUNTY DOCKET NO.: BUR-L-2238-08 CIVIL ACTION **ORDER DISMISSING AMENDED COMPLAINT PURSUANT TO *R.* 4:6-2(e) [without prejudice]**

THIS MATTER having been brought to the attention of the Court by Drinker Biddle & Reath LLP, attorneys for defendant Esquire Deposition Services, LLC ("Defendant"), for an Order dismissing Plaintiff's Amended Complaint pursuant to *R.* 4:6-2(e) for failure to state a claim upon which relief can be granted, and the Court having considered the papers submitted in support of and/or in opposition to the motion, and for good cause having been shown:

IT IS this 26th day of September, 2008 **ORDERED as follows:**

1. Plaintiff's Amended Complaint is hereby dismissed ~~with~~ [without] prejudice for failure to state a claim upon which relief can be granted.

2. Defendant's counsel shall serve copies of this Order upon Plaintiff's counsel of record within 7 days after receipt hereof.

/s/ Karen L. Suter
Karen L. Suter, J.S.C.

[– For reasons set forth orally on the record 9/26/08. Plaintiff waived the ability to replead.

– Opposed.]

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF
NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0689-06T5

JOSEPH QUIGLEY,

Plaintiff-Appellant,

v.

ESQUIRE DEPOSITION SERVICES, LLC,

Defendant-Respondent.

APPROVED FOR PUBLICATION

May 19, 2008

APPELLATE DIVISION

Argued December 11, 2007 – Decided May 19, 2008

Before Judges Skillman, Winkelstein and LeWinn.

On appeal from Superior Court of New Jersey, Chancery Division, Burlington County, Docket No. C-17-06.

Fredric J. Gross argued the cause for appellant (Alan H. Schorr & Associates, attorneys; Mr. Gross, of counsel; Alan H. Schorr, on the briefs).

Kenneth J. Wilbur argued the cause for respondent (Drinker Biddle & Reath, attorneys; Mr. Wilbur and William A. Wright and Michael E. Blaine, on the brief).

Olga E. Bradford, Deputy Attorney General, argued the cause for amicus curiae State Board of Court Reporting (Anne Milgram, Attorney General, attorney; Andrea M. Silkowitz, Assistant Attorney General, of counsel, Ms. Bradford, on the brief).

Wolf Block Schorr & Solis-Cohen, attorneys for amicus curiae Certified Shorthand Reporters Association of New Jersey, Inc. (Stuart L. Pachman, on the brief).

The opinion of the court was delivered by

SKILLMAN, P.J.A.D.

The primary issue presented by this appeal is whether, as applied to a deposition taken in connection with federal litigation, the *Federal Rules of Civil Procedure* pre-empt the New Jersey statute and administrative regulations governing shorthand reporting. We conclude that the *Federal Rules* pre-empt the statute and regulations, and therefore a deposition taken in connection with federal litigation may be transcribed by a reporter who is not certified by the New Jersey State Board of Court Reporting. However, we also conclude that the *Federal Rules* do not pre-empt a claim against a shorthand reporting company under the Consumer Fraud Act that is not dependent upon the statute and administrative regulations governing shorthand reporting.

Plaintiff Joseph Quigley was a party to litigation in the United States District Court for the District of New Jersey. During the course of that litigation,

plaintiff's adversary took his deposition in New Jersey. Plaintiff's adversary contracted with defendant Esquire Deposition Service to transcribe the deposition. Since the *Federal Rules of Civil Procedure* do not require a reporter who transcribes a deposition to furnish a copy to the other parties, plaintiff through his attorney ordered a transcript of his two-day deposition from defendant, which charged him a total of $1,251.55. Plaintiff paid this amount and received the transcript. Subsequently, the federal litigation to which plaintiff had been a party was settled.

Plaintiff brought this action claiming that defendant violated the New Jersey statute and administrative regulations governing shorthand reporting and the Consumer Fraud Act, *N.J.S.A.* 56:8-1 to -20, in transcribing his deposition and charging him for a copy. Plaintiff claimed that defendant's use of a non-certified shorthand reporter to transcribe his deposition violated the statute and administrative regulations requiring use of a certified shorthand reporter to transcribe a deposition. Plaintiff also claimed that defendant violated the administrative regulation governing the number of lines per transcript page, the number of letters per line and the format of questions and answers. In addition to these alleged violations of the state statute and administrative regulations governing shorthand reporting, plaintiff claimed that defendant violated the Consumer Fraud Act by unconscionable and fraudulent practices in billing him for a copy of his deposition. Plaintiff sought class certification of the complaint.

Defendant moved to dismiss plaintiff's complaint for failure to state a claim. The motion judge concluded in a written opinion that the statute and administrative regulations requiring a deposition to be transcribed by a certified shorthand reporter and the regulations prescribing formatting standards for deposition transcripts do not apply to depositions taken in connection with federal litigation because they are pre-empted by the *Federal Rules of Civil Procedure.* Consequently, the judge dismissed plaintiff's claims predicated on the statute and regulations. In addition, the motion judge, apparently conceiving that plaintiff's Consumer Fraud Act claims were entirely dependent upon the applicability of the statute and regulations governing shorthand reporting, also dismissed those claims. Accordingly, the judge entered judgment dismissing plaintiff's complaint.

Plaintiff appeals from the dismissal. We granted motions by the State Board of Court Reporting and the Certified Shorthand Reporters Association of New Jersey to participate as amicus curiae in the appeal.

We agree with the motion judge's conclusion that, as applied to depositions taken in connection with federal litigation, the statute and regulations governing shorthand reporting are pre-empted by the *Federal Rules of Civil Procedure.* However, the judge erred in concluding that plaintiff's Consumer Fraud Act claims are entirely dependent upon the statute and regulations. Therefore, we affirm the dismissal of plaintiff's claims based on the statute and regulations governing shorthand reporting but reverse the

dismissal of plaintiff's Consumer Fraud Act claims that are not dependent on the statute and regulations.

I

Pre-emption under the Supremacy Clause of the United States Constitution

> occurs [1] when Congress, in enacting a federal statute, expresses a clear intent to pre-empt state law, [2] when there is outright or actual conflict between federal and state law, [3] where compliance with both federal and state law is in effect physically impossible, [4] where there is implicit in federal law a barrier to state regulation, [5] where Congress has legislated comprehensively, thus occupying an entire field of regulation and leaving no room for the States to supplement federal law, or [6] where the state law stands as an obstacle to the accomplishment and execution of the full objectives of Congress.
>
> [*Louisiana Pub. Serv. Comm'n v. FCC*, 476 *U.S.* 355, 368-69, 106 *S.Ct.* 1890, 1898, 90 *L.Ed.*2d 369, 381-82 (1986) (citations omitted).]

Pre-emption may result not only from Congress's enactment of a statute but also from the Supreme Court's adoption of rules governing practice and procedure in the federal courts. *See Baylson v. Disciplinary Bd. of the Supreme Court of Pa.*, 975 *F.*2d 102,

107, 111-12 (3d Cir. 1992), *cert. denied,* 507 *U.S.* 984, 113 *S. Ct.* 1578, 123 *L. Ed.* 2d 147 (1993); *see also Sibbach v. Wilson & Co.,* 312 *U.S.* 1, 9-16, 61 *S. Ct.* 422, 424-27, 85 *L. Ed.* 479, 483-86 (1941) (discussing Congress's delegation of rule-making power to the Judiciary to adopt rules of civil procedure).

The New Jersey statute governing shorthand reporting generally prohibits any person who has not been issued a certificate by the State Board of Court Reporting from transcribing a deposition. *N.J.S.A.* 45:15B-9(a); *N.J.S.A.* 45:15B-10. If a certified court reporter is unavailable, the statute provides limited authorization for temporary employment of a non-certified court reporter. *N.J.S.A.* 45:15B-9(b).[1] The Board of Court Reporting has adopted detailed

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[1] This statute provides in part:

> Nothing in this act shall be construed to prohibit the temporary employment or retention of any person not holding a certificate until a certified court reporter is available, provided that such temporary employment shall be permitted only in such circumstances as the board may specify through regulation consistent with this section. In no instance shall a person not holding a certificate engage in court reporting without:
>
> (1) registering with the board according to such procedures as the board may adopt through regulation; . . .
>
> . . . .
>
> Registration with the board shall be for a period of one year, and shall not be renewable unless specifically authorized by the board.

regulations governing such temporary employment of non-certified reporters. *N.J.A.C.* 13:43-2.2.[2] The

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[2] The regulations provide in part:

(b) An employer of a certified court reporter, or owner of a shorthand reporting agency, or certified court reporter may utilize non-certified court reporters . . . in circumstances where a certified court reporter is unavailable. In such circumstances where a certified court reporter is unavailable, the employer, owner of a shorthand reporting agency, or certified court reporter shall contact five shorthand reporting agencies to seek an available certified court reporter. The employer, owner of a shorthand reporting agency, or certified court reporter shall record the five contacts in an affidavit supplied by the Board which shall include the names of the agencies contacted, the dates and times of the contacts, and the specific job for which the certified court reporter is sought, including the names of the agencies contacted, the dates and times of the contacts, and the specific job for which the certified court reporter is sought, including the date, time, and location of the job as well as the name(s) of the party (parties) soliciting the certified court reporter, and the name of the case for which the certified court reporter is sought.

. . . .

(c) All transcripts completed by a non-certified court reporter shall be signed by a New Jersey certified court reporter in responsible charge of the work product of the non-certified court reporter and shall attest to the accuracy of the transcription of the original shorthand notes. An employer or owner of a shorthand reporting agency who is not a certified court reporter shall secure a New Jersey certified court reporter to be in responsible charge of the work product of the non-certified court reporter and attest to the

(Continued on following page)

Board has also adopted detailed regulations governing the formatting of transcripts. *N.J.A.C.* 13:43-5.9(a).

The *Federal Rules of Civil Procedure* specifically address before whom a deposition may be taken.[3] *Rule* 28(a)(1) provides:

> Within the United States or a territory or insular possession subject to United States jurisdiction, a deposition must be taken before:
>
> (A) an officer authorized to administer oaths either by federal law or by the law in the place of examination; or
>
> (B) a person appointed by the court where the action is pending to administer oaths and take testimony.

In addition, *Rule* 29 provides:

> Unless the court orders otherwise, the parties may stipulate that:

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accuracy of the transcription of the original shorthand notes.

[3] The *Federal Rules*, including *Rules* 28, 29 and 30, were amended on December 1, 2007. *See Fed R. Civ. P.*, advisory committee's notes on *R.* 28 to 30 (2007). The changes in the rules resulting from these amendments were "stylistic only" and did not change the substance of the *Federal Rules* in effect when the depositions in this case were taken. *Ibid.* We have quoted from the current rules in this opinion.

> (a) a deposition may be taken before any person, at any time or place, on any notice, and in the manner specified[.]

The *Federal Rules* also specifically address how a deposition may be recorded. *Rule* 30(b)(3), entitled "Method of Recording[,]" provides:

> (A) Method Stated in the Notice. The party who notices the deposition must state in the notice the method for recording the testimony. Unless the court orders otherwise, testimony may be recorded by audio, audio-visual, or stenographic means. The noticing party bears the recording costs. Any party may arrange to transcribe a deposition.
>
> (B) Additional Method. With prior notice to the deponent and other parties, any party may designate another method for recording the testimony in addition to that specified in the original notice. That party bears the expense of the additional record or transcript unless the court orders otherwise.

The *Federal Rules* do not impose any requirement regarding the qualifications of a person who may stenographically record a deposition. The *Federal Rules* also do not contain any regulation of the manner in which transcripts of depositions must be formatted.

We are satisfied that, in adopting the *Federal Rules,* the Supreme Court intended to deal comprehensively with the taking of depositions in connection with federal litigation, "thus occupying [the] entire

field of regulation and leaving no room for the states to supplement [that] federal law[.]" *Louisiana Pub. Serv. Comm'n, supra,* 476 *U.S.* at 368, 106 *S. Ct.* at 1898, 90 *L. Ed.* 2d at 382. Those rules specifically address before whom a deposition may be taken and how it may be recorded. The application to a deposition taken in connection with federal litigation of the New Jersey statute and administrative regulations, which generally prohibit the stenographic transcription of a deposition by anyone other than a certified court reporter, would conflict with the provisions of the *Federal Rules* that allow the parties to decide the official before whom a deposition shall be taken and how it shall be recorded. The requirement that only a certified court reporter may transcribe a deposition or, if one is unavailable, that the time-consuming procedures set forth in *N.J.A.C.* 13:43-2.2 must be followed, also would have the potential to add to the costs of depositions taken for federal litigation, contrary to the intent of the *Federal Rules* to reduce discovery costs. *See Fed. R. Civ. P. 29 advisory committee's notes* (commenting that one purpose of the 1993 Amendment to *Rule* 29 was to encourage parties "to agree on less expensive and time-consuming methods" of discovery); *see also Hudson v. Spellman High Voltage,* 178 *F.R.D.* 29, 31 (E.D.N.Y. 1998) (noting that "[t]he Advisory Committee Notes to the 1993 Amendment to *Rule* 30(b)(2) reflect [an] . . . intent that law office personnel, rather than an independent stenographer, will most likely prepare the typed transcript of those portions of the audio or

video depositions which counsel intends to introduce at trial").

The *Federal Rules* also deal with the charge a reporter may impose for a deposition transcript. *Rule* 30(f)(3) provides that "[w]hen paid reasonable charges, the officer [before whom a deposition was taken] must furnish a copy of the transcript or recording to any party or the deponent."

The *Federal Rules* do not set forth any specific limit on the amount that may be charged for a copy of a deposition transcript. However, the Judicial Conference of the United States has adopted a schedule of rates that official court reporters may charge for transcribing proceedings in federal court. 28 *U.S.C.A.* § 753. Some federal courts have used this schedule to determine what constitutes a "reasonable and necessary" cost of a deposition transcript for purposes of taxing litigation costs pursuant to *Rule* 54, *see, e.g., Cengr v. Fusibond Piping Sys., Inc.*, 135 *F.*3d 445, 455-56 (7th Cir. 1998), and at least one federal district court has adopted a local rule which provides that in making an award under *Rule* 54, the costs of a deposition transcript "shall not exceed the regular copy rate as established by the Judicial Conference of the United States and in effect at the time the transcript or deposition was filed unless some other rate was previously provided for by order of court[,]" *N.D. Ill. R.* 54.1(b) (2007). The district courts' rule-making authority extends to any subject relating to "the conduct of their business[,]" provided the rule is "consistent with Acts of Congress and rules of practice

and procedure" adopted by the Supreme Court. 28 *U.S.C.A.* § 2071(a); *see Frazier v. Heebe,* 482 *U.S.* 641, 645-46, 107 *S. Ct.* 2607, 2611, 96 *L. Ed.* 2d 557, 565 (1987). Although we do not decide the issue, it is possible that the judges in the United States District Court for the District of New Jersey could adopt a local rule establishing a specific ceiling on charges for deposition transcripts in order to implement the mandate of *Federal Rule* 30(f)(3) that the charge for a copy of a transcript must be "reasonable." But even in the absence of such a local rule, *Federal Rule* 30(f)(3) limits the amount a stenographic reporter may charge for a copy of a deposition transcript to what is "reasonable," and any party contesting such a charge may urge the court to consider the maximum rates established by the Judicial Conference in determining what is reasonable.

For these reasons, we conclude that the *Federal Rules of Civil Procedure* comprehensively regulate the taking of depositions in connection with federal litigation, leaving no room for supplementation by state law. Therefore, the *Federal Rules* that allow a non-certified stenographic reporter to transcribe a deposition pre-empt the New Jersey statute and regulations that require a deposition to be transcribed by either a certified court reporter or a non-certified reporter under the stringent requirements set forth in the statute and regulations. *Cf. Sperry v. Florida,* 373 *U.S.* 379, 83 *S. Ct.* 1322, 10 *L. Ed.* 2d 428 (1963). Similarly, *Federal Rule* 30(f)(3), which requires the charge for a copy of a transcript to be "reasonable,"

pre-empts any supplementary state regulation of the price a stenographic reporter may charge for a deposition transcript.

The regulations adopted by the State Board of Court Reporting regarding the formatting of transcripts apply only to transcripts prepared by New Jersey certified court reporters. *N.J.A.C.* 13:43-5.9. Because plaintiff's deposition was not prepared by a certified court reporter and we have concluded that the *Federal Rules* authorize a non-certified reporter to transcribe a deposition taken in connection with federal litigation, defendant was not required to comply with the New Jersey formatting regulations in preparing the transcript of plaintiff's deposition.

II

Although plaintiff's claims based on the statute and regulations governing shorthand reporting are pre-empted, we conclude that his complaint states claims under the Consumer Fraud Act that are not dependent upon the statute and regulations and are not pre-empted.

This case was brought before the trial court by a motion under *Rule* 4:6-2(e) to dismiss for failure to state a claim. On such a motion, "a reviewing court 'searches the complaint in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary.'" *Printing Mart-Morristown v. Sharp Elecs.*

Corp., 116 *N.J.* 739, 746 (1989) (quoting *Di Cristofaro v. Laurel Grove Mem'l Park*, 43 *N.J. Super.* 244, 252 (App. Div. 1957)).

> The Consumer Fraud Act prohibits any
>
> > act, use or employment by any person of any unconscionable commercial practice, deception, fraud, false pretence, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise or real estate, or with the subsequent performance of such person as aforesaid[.]
>
> [*N.J.S.A.* 56:8-2.]

"Merchandise" is defined as "any objects, wares, goods, commodities, *services* or anything offered, directly or indirectly to the public for sale." *N.J.S.A.* 56:8-1(c) (emphasis added). Under this expansive definition of "merchandise," the provision of shorthand reporting services and sale of transcripts of depositions is subject to the Consumer Fraud Act. Any person who suffers "ascertainable loss of money or property" as a result of a violation of the Act may maintain a private action for treble damages. *N.J.S.A.* 56:8-19. Consequently, any "deception" or other violation of *N.J.S.A.* 56:8-2 in the conduct of the shorthand reporting business could support a claim under the Act.

Plaintiff's complaint alleges that defendant's "billing rate for . . . transcripts was fraudulent" and that defendant engaged in a "deceptive practice" in determining its billings. The complaint further alleges that defendant charged an undisclosed "administrative fee" in addition to the "stated page rate" for the transcript of his deposition. We are satisfied that these allegations are sufficient to state a claim for relief under the Consumer Fraud Act that is not dependent upon the statute and regulations governing shorthand reporting.

Moreover, there is no basis for concluding that the *Federal Rules of Civil Procedure* were intended to pre-empt application of state consumer fraud statutes to fraudulent or deceptive business practices of a shorthand reporting company. There is a presumption that federal law "does not cavalierly pre-empt state-law causes of action." *Bates v. Dow Agrosciences, LLC,* 544 *U.S.* 431, 449, 125 *S. Ct.* 1788, 1801, 161 *L. Ed.* 2d 687, 706 (2005) (quoting *Medtronic v. Lohr,* 518 *U.S.* 470, 485, 116 *S. Ct.* 2240, 2250, 135 *L. Ed.* 2d 700, 715 (1996)). We perceive nothing in the *Federal Rules* relating to the taking of depositions in connection with federal litigation that suggests an intent to pre-empt the application of state statutes prohibiting fraudulent or deceptive business practices. Therefore, to the extent plaintiff's complaint may be read to state claims under the Consumer Fraud Act that are not dependent upon the New Jersey statutes and administrative regulations

governing shorthand reporting, it is not subject to federal pre-emption.

We reject defendant's argument that their business operations are exempt from the Consumer Fraud Act because they are engaged in a "quasi-professional" activity. The cases upon which defendant relies, such as *Macedo v. Dello Russo,* 178 *N.J.* 340, 345-46 (2004) and *Plemmons v. Blue Chip Insurance Services, Inc.,* 387 *N.J. Super.* 551, 560-65 (App. Div. 2006), involved professional activities that were subject to comprehensive regulation under statutes other than the Consumer Fraud Act. Defendant's primary argument in this appeal, which we have accepted, is that their shorthand reporting services provided in connection with depositions for federal litigation are not subject to regulation under the statute and regulations governing shorthand reporting. Therefore, defendant cannot claim the exemption from the Consumer Fraud Act that our cases have recognized for regulated professional activities.

Plaintiff concedes that count one of his complaint is not maintainable, and counts two and three rest solely on the statute and regulations governing shorthand reporting. Accordingly, we affirm the dismissal of those counts. Counts four through six of plaintiff's complaint state claims that rest partly on the statute and regulations governing shorthand reporting but also may be read to state claims that can stand independently of those statutes and regulations. Accordingly, we reverse the dismissal of those counts and remand the case to the trial court. Plaintiff is granted

leave to file an amended complaint that restates counts four to six in a form that conforms with this opinion.

PREPARED BY THE COURT

JOSEPH QUIGLEY, individually and on behalf of all others similarly situated,	SUPERIOR COURT OF NEW JERSEY BURLINGTON COUNTY LAW DIVISION
Plaintiff,	Doc. No. BUR-L-2238-08
v.	**AMENDED ORDER DISMISSING AMENDED COMPLAINT PURSUANT TO *R.* 4:6-2(e) WITH PREJUDICE**
ESQUIRE DEPOSITION SERVICES, LLC,	
Defendant.	Dated: October 24, 2008

This matter having been opened to the Court by motion by Drinker, Biddle & Reath, LLP, attorneys for defendant Esquire Deposition Services, LLC, for an Order dismissing Plaintiff's Amended Complaint pursuant to *R.* 4:6-2(e) for failure to state a claim upon which relief can be granted, and the Court having considered the papers submitted in support of and in opposition to the motion, and the court having considered oral argument, and for good cause shown:

IT IS on this 24th day of October, 2008, Ordered as follows:

1. Plaintiff's Amended Complaint is hereby dismissed with prejudice for failure to state a claim upon which relief can be granted, as the plaintiff declined the Court's opportunity to revise the Complaint.

2. Defendant's counsel shall serve a copy of this Order on plaintiff's counsel within 7 days of receipt.

/s/ Karen L. Suter
Karen L. Suter, J.S.C.

DRINKER BIDDLE & REATH LLP
A Pennsylvania Limited Liability Partnership
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Attorneys for Defendant
Esquire Deposition Services, LLC

JOSEPH QUIGLEY, individually and on behalf of all others similarly situated, Plaintiff, v. ESQUIRE DEPOSITION SERVICES, LLC, Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION: GENERAL EQUITY BURLINGTON COUNTY DOCKET NO. BUR-C-000017-06 CIVIL ACTION **ORDER DISMISSING COMPLAINT PURSUANT TO *R.* 4:6-2(e)**

THIS MATTER having been brought to the attention of the Court by Drinker Biddle & Reath LLP, attorneys for defendant Esquire Deposition Services, LLC ("Esquire"), for an Order dismissing Plaintiff's Complaint pursuant to *R.* 4:6-2(e) for failure to state a claim upon which relief can be granted, and the Court having considered the papers submitted in support of and/or in opposition to the motion, and for good cause having been shown:

IT IS this 6th day of September, 2006 **ORDERED as follows:**

1. Plaintiff's Complaint is hereby dismissed with prejudice for failure to state a claim upon which relief can be granted.

2. Defendant's counsel shall serve copies of this Order upon Plaintiff's counsel of record within ___ days after receipt hereof.

/s/ Ronald Bookbinder
RONALD E. BOOKBINDER, P.J.C.

EXPANDED FINDINGS
RONALD E. BOOKBINDER, P.J.CH.

JOSEPH QUIGLEY, individually and on behalf of all others similarly situated Plaintiff-Appellant, v. ESQUIRE DEPOSITION SERVICE, LLC Defendant-Respondent.	Superior Court of New Jersey Chancery Division Burlington County Civil Action Docket No.: A-00689-08T3

PRELIMINARY STATEMENT

The matter on appeal came before the Court on a Motion to Dismiss brought by Defendant Esquire Deposition Service, LLC. The case arose out of Plaintiff Joseph Quigley's involvement as a litigant in a case in the Federal District Court for the District of New Jersey known as *Teleresource Consulting Group, Inc. v. Genesis Health Ventures, Inc.*, Docket No. 1:02-CV-06136. In the *Teleresource* matter, Plaintiff's deposition was taken and the opposing party who noticed the deposition chose Defendant, Esquire Deposition Service, as the stenographer for the deposition.

Plaintiff brought this class action complaint against Defendant alleging violations of the Consumer Fraud Act ("CFA") and sought certification of six different classes under New Jersey Court Rule 4:32-1(b)(2), demanding attorney fees and treble

damages. Plaintiff's complaint alleged: (1) that Ms. Ochipinti, the reporter for Plaintiff's deposition, was not a New Jersey Certified Shorthand Reporter ("NJSCR" [sic]); (2) that the transcript was not prepared in the format in accordance with New Jersey state regulations regarding transcripts prepared by an NJSCR [sic]; and (3) that there were issues in regards to charges for the transcript. Plaintiff did not allege that he objected to any irregularities in the deposition under Federal Rule of Civil Procedure 32(d) nor did he allege that he objected to the reasonableness of the charges pursuant to Fed. R. Civ. P. 30(f)(2).

Upon review of the extensive briefing by the parties, the New Jersey Attorney General, and the amicus briefs submitted on behalf of the New Jersey Board of Shorthand Reporting (the "Board") and the Certified Shorthand Reporters Association of New Jersey, the Court heard oral argument on August 11, 2006. Thereafter, the Court dismissed Plaintiff's complaint for failure to state a claim upon which relief could be granted on grounds of Supremacy Clause preemption.

DEFENDANT'S ARGUMENT

The Defendant argued that Plaintiff's claims were barred by the Supremacy Clause because there is a conflict between Federal and State Rules governing depositions. Depositions in New Jersey are governed by *N.J.S.A.* 45:15B-9 and *N.J.A.C.* 13:43-2.2

whereas depositions in federal court are governed by Fed. R. Civ. P. 28(a) and 29. Defendant contended that in this conflict, the Federal Rules prevail. Citing *Sperry v. State of Florida*, 373 U.S. 379 (1963), Defendant asserted that the State lacked the authority to regulate the conduct of federal judicial proceedings.

Moreover, for purposes of the Supremacy Clause, a federal procedural rule adopted pursuant to the Rules Enabling Act, 28 U.S.C. §2071(a), is the equivalent of federal legislation. *Baylson v. Disciplinary Board of the Supreme Court of Pennsylvania*, 975 F. 2d. 103 (3d Cir. 1992). In the present matter, Defendant alleged that the party who noticed Plaintiff's Deposition in *Teleresource* had the right to have that deposition recorded by anyone authorized to do so under the Federal rules. Plaintiff did not allege a violation of those Rules, which did not require utilization of a NJCSR or that the transcript be prepared pursuant to New Jersey statutes,

In addition, Defendant argued that the State did not have the authority to regulate federal judicial proceedings, but no evidence was presented to this Court that it ever intended to do so. Regulations governing court reporter conduct, *N.J.A.C.* 13:43, et. seq. state they have limited applicability to "a certified shorthand reporter." Defendant contended that this reflects intent to limit the scope of those regulations to proceedings in which the use of a NJCSR is required, not to all proceedings in New Jersey.

The Board declined to provide the notice which would have been required had it intended to regulate reporters transcribing depositions in federal proceedings, *N.J.S.A.* 52:14B-22. Board regulation of depositions in federal proceedings would involve participation in a program established under federal law. If these regulations were required, it would impose requirements exceeding those set forth in *N.J.S.A.* 52:14B-23.

Defendant's second argument was that Plaintiff's claims fail to set forth a claim under the CFA. To satisfy the CFA, Plaintiff must allege an unlawful Act defined under the Statute. In doing so, Plaintiff here alleged violation of the NJCSR. regulations and asserts that the CFA has been construed to provide that any violation of a statute or a Division of Consumer Affairs regulation constitutes a per se violation of the Act. Furthermore, the Defendant argued that Plaintiff premised this assertion on *Cox v. Sears Roebuck & Co.*, 138 NJ. 2, 19 (1994), in which the Court recognized violations of specific regulations promulgated under the Act as unlawful.

Defendant contended that it was only a violation of the regulations promulgated under the CFA itself, not every regulation promulgated by Division of Consumer Affairs, which would amount to a violation of the CFA. Defendant argued that the regulations in this matter were not promulgated under CFA, but pursuant to *N.J.S.A.* 45:15B-1. Moreover, all charges to Plaintiff were clearly identified and discernable from the invoices. Since the regulations in question

were not promulgated under the, CFA Defendant asserted that they did not require itemization. Thus, Defendant argued that the absence of prior disclosure of price and terms could not rise to the level of an unlawful act under the CFA.

Under *N.J.S.A.* 56:8-19, a private cause of action under CFA must allege an "ascertainable loss of money or property." Defendant argues that nowhere in the Complaint does Plaintiff allege that he suffered any ascertainable loss as a result of the alleged acts by Ms. Ochipinti. Defendant cites *Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 139 N.J. 392, 417 (1995) for the proposition that New Jersey has recognized a distinction between consumer fraud and customer dissatisfaction.

Defendant also argued that the presence of Plaintiff's adversary as the party retaining the reporter destroys the required link between Ms. Ochipinti's qualifications and any ascertainable loss on the part of Plaintiff. Plaintiff's deposition was conducted in a proceeding in federal court. Many essential elements of Plaintiff's CFA claim "bump up" against the Federal Rules. For example, the requirement that a reporter be a NJCSR or follow such regulations conflicts with Fed. R. Civ. P. 28 and 29. Furthermore, the Defendant asserted that permitting a CFA claim on the charge for a federal deposition, conflicts with mechanisms already in place under the Federal Rules. These conflicts between state and federal law bar Plaintiff's claim. *Daaleman v. PSE&G*, 77 N.J. 267 (1978).

Defendant's final argument was that Plaintiff's class claims should be dismissed because the proposed classes could not be certified. The party requesting class certification bears the burden of demonstrating that the proposed class meets all of the requirements set forth in New Jersey Rule 4:32-1(a). The Defendant contends that the proposed classes cannot be certified because the relief sought is not injunctive in nature. Plaintiff contended that "final injunctive relief in the form of an Order for an accounting and the payment of treble damages to the class as a whole would be appropriate," to be maintained under *R.* 4:32-1(b)(2). However, Defendant argued that subsection (b)(2) is only for classes truly seeking injunctive or declaratory relief.

Defendant also stated that the proposed classes lack cohesiveness. Under *R.* 4:32-1(b)(2), a class must be cohesive in order to act or refuse to act. Plaintiff's proposed Cause of Action II class would consist of all New Jersey litigants who received billings from Esquire for deposition transcripts tainted by one or more violations of the requirements of *N.J.A.C.* 13:43-2.2. For each member, the Court would need to ascertain which provisions were not complied with, and whether the deviation from the regulation rose to the level of an unlawful act under the CFA. These individual determinations are not only case-specific, but party-specific. As such, the class cannot be certified and the Defendant requested that Plaintiff's complaint be dismissed with prejudice.

PLAINTIFF'S OPPOSITION

Plaintiff first argued that the Federal Rules of Civil Procedure do not pre-empt New Jersey's entitlement to regulate stenographic reporters practicing within the State. Plaintiff claimed that the Defendant's argument, that the Supremacy Clause prevents New Jersey from regulating those transcribing deposition testimony, is incorrect. Moreover, Defendant claims that because depositions of the named Plaintiff related to a case being litigated in District Court, it is sufficient that Defendant and its agent complied with the Federal Rules. Yet, nothing in the Federal Rules makes State regulation of stenographic reporting inapplicable. The depositions were conducted in New Jersey and Federal pre-emption of state law cannot occur in the absence of a clear congressional intent or a clear conflict between federal and state law. *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 540-553 (2001). Defendant did not cite to anything evidencing a congressional intention to remove regulation of stenographic reporters in federal proceedings from state jurisdiction.

Plaintiff argued that the Supremacy Clause operates in three situations (1) when the federal government has pre-empted a field; (2) when a State enactment directly conflicts with a federal enactment; and (3) when a State enactment inevitably frustrates the purpose of a federal enactment. *Rose v. Arkansas State Police*, 479 U.S. 1 (1986). Here, the federal rules do not regulate stenographic reporters since the New

Jersey regulation of these matters did not frustrate, interfere with or conflict with any federal rules.

In a Rule 32(d)(2) challenge to a stenographer's qualification, a federal court would not hold the stenographer qualified simply because he/she is a New Jersey notary public. Rule 29 provides that the parties may (not must) by written stipulation determine when, where, upon what notice and before whom a deposition shall be taken. Here, there is no such written stipulation. Esquire concealed the lack of New Jersey qualifications of the stenographer and the excessive fees. Moreover, Rule 30(f)(2) does not specify how to remedy overcharging; it merely authorizes stenographers to collect reasonable charges. Esquire's charges exceed the official District of New Jersey schedule.

Further, the Defendant relied on *Sperry v. State of Florida*, 373 U.S. 379 (1963) in arguing that the present complaint frustrates federal law. However, in *Sperry*, Florida attempted to regulate the practice of a patent attorney, Defendant's citation is distinguishable because the patent office, by statute and regulation, governs the profession of patent law. Here, the Rules of Civil Procedure do not govern the practice of stenographic transcription. In the absence of any conflict between federal and state regulations, it must be concluded that the federal courts leave the regulation of stenographers and transcript preparers to the States.

Plaintiff next argued that a valid CFA claim is asserted. Defendant relied on *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 19 (1994). However, the evidence in Cox demonstrated that Sear's work failed to comply with building and electrical codes and home repair regulations, and that Sears had violated the Act through its failure to have competent contractors. *Id.* at 10. All of the regulations in *Cox* were designed to protect members of the public. Even if violations of shorthand reporter regulations were not per se violations of CFA, these regulations affect a standard of fair conduct in dealing with the consumer. As such, Plaintiff asserted that Esquire's practice involved deception, false pretense or knowing concealment, violations of CFA.

Although the Defendant argued that no regulation required pre-purchase disclosure of per page rate, etc, Esquire's prices are far above market rates for New Jersey. Defendant also contended that Plaintiff had a duty to inquire and that the CFA is not violated in the absence of any request for billing information. Yet, the purpose of CFA was to require good faith and fair dealing. Excessive prices fall within the purview of the CFA. *Kugler v. Romain*, 58 N.J. 522 (1971) Plaintiff further asserted the Defendant's reliance on *Turf Lawnmower* was misplaced. *Turf* was a defamation case, not a CFA case. Additionally in *Turf*, the prices were posted on the items in question. Here, Esquire does not disclose its pricing until after the transcript was delivered.

The Defendant also claimed that there was no ascertainable loss. Under *Cox,* loss is ascertained in the billing for a sale or performance entailing a violation of CFA. *Cox* establishes that the amounts billed are the measure of ascertainable loss. Defendant's claim that Plaintiff's allegations do not rise to the level of ascertainable loss is incorrect. The Defendant argued that there is no causal link between the regulatory violations and any loss. Yet, the final two causes of action are not based on any regulatory violation, and therefore are not addressed by the Defendant. Esquire's inflation of the page pricing is a causal link.

Furthermore, Plaintiff argued that the Defendant's attack on the class allegations would not support a dismissal, even if meritorious. The complaint asked for an equitable remedy. Implicit in any verdict for Plaintiff would be a declaratory judgment that Defendant cannot bill for transcripts prepared in disregard of certain Board of Shorthand Reporting regulations. Such a remedy is equitable in nature. In this case, case management would defer a ruling on the adequacy of the class allegations until a class certification motion is before the Court. The Defendant contends that *R.* 4:32-1(b)(2) would not be appropriate because the relief is not truly injunctive. Yet, the governing principle is that class action rule should be construed liberally in a case involving consumer fraud. The accounting Plaintiff seeks is a form of injunction.

Plaintiff also contended that each class definition is tied to a particular wrong. Courts often identify and certify subclasses, as it is against public policy to find a waiver of a CFA cause of action, contrary to Defendant's contention. As such, Plaintiff requested that the Defendant's motion be denied.

DEFENDANT'S REPLY

In response, the Defendant stated that *Sperry v. State of Florida*, 373 U.S. 379 (1963) makes clear that states cannot regulate conduct of federal proceedings within their borders. Plaintiff's attempt to avoid preemption by denying that there is a genuine conflict between New Jersey's regulatory scheme and any federal law is incorrect. State law, if it governed the deposition in question, would have required use of a New Jersey Certified Shorthand Reporter if available. Federal law, which did govern, imposes no such requirement. Plaintiff suggests that Fed. R. Civ. P. 28(a) determines who may officiate at a deposition, not who may take testimony. Yet, the conflict is clear and direct, and this conflict renders the State regulatory system inapplicable. Any attempt to engraft the State scheme on federal deposition practice would frustrate either purpose of the scheme.

Parties to federal proceedings do not have to have the deposition transcribed by a reporter. In contrast to the New Jersey system, parties to a federal proceeding can merely have a deposition audiotaped and played back at trial. If any transcript of such a

deposition is needed, it can be prepared by a typist in the attorney's office. The Federal Rules attempt to stop disputes by requiring that challenges to qualifications or the manner in which the deposition was taken be made at deposition itself or as soon as possible. This benefit would be lost if federal litigants in New Jersey would be required to follow the more formalistic New Jersey procedures.

Additionally, New Jersey regulations were never intended to apply to federal proceedings. Plaintiff ignores this issue, as there is no indication that the statute or regulations were intended to apply in this context. Further, there is a clear expression of agency intent that the regulations do not apply in this context.

The CFA claims fall on their own weight. Plaintiff makes no effort to link any particular argument to any particular count. Unless the use of the transcript has somehow been impaired, the credentials of the person who created it have no independent impact on its value. This is the subjective and intangible disenchantment which the Court does not give rise to as an ascertainable loss. *Thieremann v. Mercedes Benz, US, Inc.*, 183 N.J. 234, 251 (2005). Plaintiff is incorrect that *Cox* establishes that the amounts billed are the measure of ascertainable loss. In fact, the *Cox* Court held that the proper measure of Plaintiff's consumer fraud damages is the cost of repair. Id. at 24. The alleged unlawful acts are predicated on the price charged. In *Turf Lawnmower*, the Court essentially held that the CFA does not provide an

independent basis for regulating price. (Plaintiff ignores the requirement that the regulation of price requires legislative authorization and definition. *Heir v. Degnan*, 82 N.J. 109, 120-22 (1980).

Kugler v. Romain, which Plaintiff cites for the proposition that CFA alone gives a court authority to determine if a price is unlawful, says nothing of the sort. For the price at issue in *Kugler* to be considered actionable under CFA, the Attorney General had to show that the price was unlawful as a result of operation of another law. Here, no violation of another price-control regulation has been alleged. In this absence, Counts IV, V and VI fail to state a claim for relief under CFA.

With respect to the class claims, Plaintiff does not dispute that if the individual claims are dismissed, the corresponding class claims must be dismissed. The general principle that class action rules are construed liberally in CFA cases does not mean that the rules are ignored. In *Goadstone v. American Cyanamid*, 354 N.J. Super. 519, 531-32 (Law Div. 2002), the Court held that if the relief sought is entirely or predominantly damages, then (b)(2) certification is inappropriate. This is the case here. All equitable relief requested is incidental to or a predicate for the primary remedy of the complaint: treble damages and attorney fees. Further, the class lack [sic] cohesiveness. Plaintiff's contention is that the classes can be made cohesive because the amount of ascertainable loss is determined by contract amount. As a result, all of the potential individual

determinations outlined in Esquire's brief will have to be made for each member of each class. Thus, it is clear that the class lacks cohesiveness.

LAW AND ANALYSIS

Initially the Defendant filed a motion pursuant to *R.* 4:6-2(e) for "failure to state a claim upon which relief can be granted." Under *R.* 4:6-2(e), a motion to dismiss for failure to state a cause of action is granted in rare circumstances. The test for determining the adequacy of a pleading is whether a cause of action is "suggested by the facts." *Printing Mart-Morristown v. Sharp Electronic Corp.*, 116 N.J. 739 (1989). Under the "suggested by the facts" test, a Court should not dismiss a Complaint when by examining the Complaint:

> "[I]n depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of claim, opportunity being given to amend if necessary. At his [sic] preliminary stage of the litigation the Court is not concerned with the ability of plaintiffs to prove the allegations contained in the complaint. For purposes of analysis plaintiffs are entitled to every reasonable inference of fact. The examination of a complaint's allegations of fact required by the aforestated principles should be one that is at once painstaking and undertaken with a generous and hospitable approach."

Id. at 746. Moreover, "motions to dismiss should be granted in only the rarest [of] instances." *Banco Popular North America v. Gandi*, 184 N.J. 162, 165 (2005); *quoting*, *Printing Mart*, 116 N.J. at 746. Further, pursuant to *R.* 4:5-7: "[e]ach allegation of a pleading shall be simple, concise and direct, and no technical forms of pleading are required." *R.* 4:5-7. Consequently, in ruling on a motion to dismiss, "courts must 'assume the facts as asserted by plaintiff are true and give [plaintiff] the benefit of all inferences that may be drawn in her favor." *Id.* at 166; *quoting, Velantzas v. Colgate-Palmolive Co.*, 109 N.J. 189, 192 (1988). Additionally, "[a]ll pleadings shall be liberally construed in the interest of justice." *Id.* Thus, "[i]f a generous reading of the allegations merely suggests a cause of action, the complaint will withstand the motion." *Smith v. SBC Communications*, 178 N.J. 265, 282 (2004); *quoting, F.G. v. MacDonell*, 150 N.J. 550, 556 (1997).

Rule 4:6-2(e) states:

> If, on a motion to dismiss based on the defense numbered (e), matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for ***summary judgment*** and disposed of as provided by R. 4:46, and all parties shall be given reasonable opportunity to present all material pertinent to such a motion.

Rule 4:46-2 of the New Jersey Court Rules provides that summary judgment shall be "rendered forthwith if the pleadings, depositions, answers to

interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact challenged and that the moving party is entitled to a judgment order as a matter of law." *R.* 4:46-2. The case of *Brill v. Guardian Life Insurance Company of America*, 142 N.J. 520 (1995), set [sic] forth a new standard for a trial court to apply when determining whether an alleged disputed issue of fact should be considered "genuine" for purposes of *Rule* 4:46-2. The *Brill* court stated that:

> [U]nder this new standard, a determination whether there exists a 'genuine issue' of material fact that precludes summary judgment requires the motion judge to consider whether the competent evidential materials presented, when viewed in the light most favorable to the non-moving party are sufficient to permit a rational fact finder to resolve the alleged disputed issue in favor of the non-moving party.

Id. at 540. The *Brill* court further clarified that "[i]f there exists a single, unavoidable resolution of the alleged disputed issue of fact, that issue should be considered insufficient to constitute a 'genuine' issue of material fact for purposes of Rule 4:46-2." *Id.* Rather, when the evidence "is so one sided that one party must prevail as a matter of law," the trial court should not hesitate to grant summary judgment. *Id.*, citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986). Additionally, "[m]ere sworn conclusions of ultimate facts, without material basis or supporting affidavits by persons having actual knowledge of the

facts, are insufficient to withstand a motion for summary judgment." *James Talcott, Inc. v. Schulman*, 82 N.J. Super. 438, 443 (App. Div. 1964).

SUPREMACY CLAUSE

N.J.S.A. 45:15B-9 governs the practice of shorthand reporting without certificate. It provides, in pertinent part:

a. No person shall engage in the practice of court reporting in this State unless the person has first obtained a certificate from the board as provided pursuant to P.L.2005, c.308 (C.45:15B-1 et al.).

b. Nothing in this act shall be construed to prohibit the temporary employment or retention of any person not holding a certificate until a certified court reporter is available, provided that such temporary employment shall be permitted only in such circumstances as the board may specify through regulation consistent with this section. In no instance shall a person not holding a certificate engage in court reporting without:

(1) registering with the board according to such procedures as the board may adopt through regulation; and

(2) disclosing to the participants at a proceeding and obtaining written acknowledgment from such participants, prior to the commencement of any proceeding, that the person does not hold a certificate and is

registered with the board to work on a temporary basis.

N.J.S.A. 45:15B-9(a),(b). Further, N.J.A.C. 13:43-2.2 provides that:

> (b) An employer of a certified shorthand reporter, or owner of a shorthand reporting agency, or certified shorthand reporter may utilize non-certified shorthand reporters referred to in (a) above in circumstances where a certified shorthand reporter is unavailable. In such circumstances where a certified shorthand reporter is unavailable, the employer, owner of a shorthand reporting agency; or certified shorthand reporter shall contact five shorthand reporting agencies to seek an available certified shorthand reporter.

N.J.A.C. 13:43-2.2(b).

However, shorthand reporting under the federal rules, which applies in the context of a deposition taken in District Court, is governed by Federal Rule 28. This rule states:

> Within the United States or within a territory or insular possession subject to the jurisdiction of the United States, depositions shall be taken before an officer authorized to administer oaths by the laws of the United States or of the place where the examination is held, or before a person appointed by the court in which the action is pending. A

> person so appointed has power to administer oaths and take testimony. The term officer as used in *Rules 30, 31* and *32* includes a person appointed by the court or designated by the parties under *Rule 29*.

Further, Federal Rule 29 states:

> Unless otherwise directed by the court, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify other procedures governing or limitations placed upon discovery . . .

Under the Supremacy Clause, U.S. Const. Art. VI, cl. 2, when state law conflicts or is incompatible with federal law, the state law is pre-empted by federal law. *Baylson v. Disciplinary Board of the Supreme Court of Pennsylvania*, 975 F. 2d. 103 (3d Cir. 1992). Pre-emption occurs when Congress explicitly or implicitly states its intent to regulate a specific area at the exclusion of the states. Fidelity Federal Sav. & Loan Ass'n v. De La Cuesta, 458 U.S. 141, 152, 153 (1982), *Sperry v. State of Florida*, 373 U.S. 379, 384 (1963). Pre-emption also occurs when the state regulation actually conflicts or is incompatible with federal law. Fidelity Federal, 458 U.S. at 153. These principles apply even when the area being regulated by federal law is one of special concern to the state. *Baylson v. Disciplinary Board of the*

Supreme Court of Pennsylvania, 975 F. 2d. 103 (3d Cir. 1992).

State law, if it governed the deposition in question, would have required use of a New Jersey Certified Shorthand Reporter if available. Federal law, which did govern, imposes no such requirement. As Defendant noted, Plaintiff did not object to any irregularities regarding the taking of the deposition under Federal Rules. Plaintiff's suggest that Fed. R. Civ. P. 28(a) determines who may officiate at a deposition, not who may take testimony. It seems evident that the requirements of a reporter for a deposition in federal court impose less stringent requirements than do the laws of the State of New Jersey. However, if parties taking depositions in a federal proceeding needed to comply with state regulations regarding depositions, the liberality of the Federal Rules to enhance and expedite discovery procedures would, in affect [sic], be rendered useless. Every Federal Court, regardless of which district it is, is still within the borders of a state. To require parties to comply with State regulations of Deposition in all Federal proceedings would render the Federal Rules concerning depositions moot.

Here, New Jersey does have an important interest in regulating the requirements of stenographers and shorthand reports. However, "the law of the State, though enacted in the exercise of powers not controverted, must yield when incompatible with federal legislation." *Sperry v. State of Florida*, 373

U.S. 379 (1963), quoting *Gibbons v. Ogden*, 22 U.S. 1 (1824)

Plaintiff contends that because the deposition was taken in New Jersey, it is immaterial that jurisdiction for the litigation was in Federal District Court. As such, Plaintiff argues that Federal law cannot preempt State law. Yet, this argument is unavailing. Although Plaintiff is correct in stating that nothing in the Federal rules, *per se*, makes State regulation of stenographic reporting inapplicable, Plaintiff dismisses the fact that if such regulation imposes different requirements that conflict with Federal law, the State law is pre-empted.

Contrary to Plaintiff's contention, ruling Defendant's favor on the Supremacy Clause is not a conclusion that Federal Law preempts New Jersey's right to regulate shorthand reporting. This matter was conducted in federal court, which was districted in New Jersey. In order to depose the parties in this matter, they needed to have satisfied the Federal Rules with regards to depositions, not the New Jersey State Rules. This Court is not concluding that the Board would need to be abolished, as the Board still regulates shorthand reporting in state cases. However, the Board does not have the power to regulate Federal cases with regards to shorthand reporters. The fact that the Federal case happened to take place within the State does not give the Board the power to override the more liberal Federal Rules in this context. To do so would, in essence, moot the need for

Federal Rules as each Federal Case would then have to abide by State regulations.

This Court is satisfied that on its face, the requirement language of the State law conflicts with the Federal Rules. Further, nowhere in *N.J.S.A.* 45:15B-9 nor N.J.A.C. 13:43-2.2 is there language that purports this law to govern any federal proceeding that happens to take place within the state of New Jersey. If such were the case, then in any federal proceeding, if a party was unable to meet the statutory requirements for the taking of a deposition in one state that party could merely "shop around" for a state in which the requirements were less stringent. This can hardly be what the Federal Rules attempted to create. As such, Defendant's motion with respect to the Supremacy Clause is **granted.**

CONSUMER FRAUD ACT

Although this Court granted Defendant's motion with respect to the Supremacy Clause, and if such decision stands, would render the CFA claims moot, this Count will review the matters concerning the CFA as if Defendant did not prevail under the Supremacy Clause argument.

The Consumer Fraud Act provides:

> "Any person who suffers any ascertainable loss of moneys or property, real or personal, as a result of the use or employment by another person of any method, act, or practice declared unlawful under this act or

> the act hereby amended and supplemented may bring an action or assert a counterclaim therefore in any court of competent jurisdiction. In any action under this section the court shall, in addition to any other appropriate legal or equitable relief, award threefold the damages sustained by any person in interest. In all actions under this section, including those brought by the Attorney General, the court shall also award reasonable attorneys' fees, filing fees and reasonable costs of suit."

N.J.S.A. 56:8-19.

In *Cox v. Sears Roebuck & Co.*, 138 N.J. 2, 15 (1994), the New Jersey Supreme Court noted that to recover under the Act, a private plaintiff such as Cox must prove loss, and that a breach-of-contract claim also required proof of damages. Id. at 10-11. The Act is designed to protect the public, thus resulting in a liberal construction of the Act. Id. at 16. However, treble damages are not awarded unless the private plaintiff can show that he or she suffered an ascertainable loss as a result of the unlawful conduct.

A violation of the Act can fall into three categories: affirmative acts, knowing omissions, and regulation violations. Id. at 19. In this matter, the Court is concerned with the third category – violations of specific regulations promulgated under the Act. In those instances, intent is not an element of the unlawful practice, and the regulations impose strict liability for such violations. *Fenwick v. Kay Am.*

Jeep, Inc., 136 N.J. Super. 114, 123-24 (App. Div. 1975).

In Cox, the Plaintiff contracted with Sears Roebuck & Co. (Sears) to renovate his kitchen. 139 N.J. at 7. When the job was finished, problems included unattractive renovations, incomplete and substandard electrical work that "failed to comply with building and electrical codes and home-repair regulations," buckled flooring, lopsided installation of a microwave hood and microwave, and mismatched and cracked cabinet trim. Id. at 8-9.

The key substantive provisions of the Consumer Fraud Act are set out in Section 2, *N.J.S.A.* 56:8-2:

> The act, use, or employment by any person of any unconscionable commercial practice, deception, fraud, false pretense, false promise, misrepresentation, or the knowing, concealment, suppression, or omission of any material fact with intent that others rely upon such concealment, suppression or omission, in connection with the sale or advertisement of any merchandise . . . , whether or not any person has in fact been misled, deceived, or damaged thereby, is declared to be an unlawful practice . . .

The Act should be construed liberally in favor of consumers. *Barry v. Arrow Pontiac, Inc.*, 100 N.J. 57, 69 (1985). And it also noted that it is the "capacity to mislead" which is at the heart of the definition of an "unlawful practice." *Cox*, 138 N.J. at 17. A practice

can be unlawful "even if no person was in fact misled or deceived thereby." *Id.*

Pursuant to *N.J.S.A.* 56:8-4, the Division of Consumer Affairs may adopt regulations which have the force of law. A violation of any regulation will constitute a violation of the Act. *Cox*, 138 N.J. at 18-19. Knowing omissions – can consist of (i) concealment; (ii) suppression; or (iii) omission. With respect to those violations, however, intent is an essential element. There must be proof that the defendant acted knowingly, with intent that another rely on such concealment, suppression, or omission. *Id.* at 18. Also, there must be a "causal relationship" between the unlawful practice and the "ascertainable loss" sustained by the plaintiff. Ramanadham v. New Jersey Mfrs. Ins. Co., 188 N.J. Super. 30, 33 (App. Div. 1982).

Unconscionable commercial practice is a term designed "to establish a broad business ethic. It implied a lack of good faith, honesty in fact and observance of fair dealing. *See* Cox, 138 N.J. at 18. Here, the regulations were not promulgated under CFA, but pursuant to *N.J.S.A.* 45:15B-1. Violations of these regulations do not constitute *per se* violations of CFA.

Further, in *Kugler v. Romain*, 58 N.J. 522 (1971), the Court found that the price at issue was grossly excessive in relation to the seller's costs. Id. at 530. The illegal aspect of the sales contract was the fixed price of about two and a half times a reasonable price

in the relevant market. Id. In deciding whether defendant, contrary to the statute, used any deception, fraud, false pretense, or misrepresentation, or whether he concealed, suppressed or omitted any material fact in connection with the sales to book purchasers, the price charged the consumer is only one element to be considered. Although the Kugler court stated that "Unconscionability is not mentioned by name in Section 2 of the Consumer Fraud Act, the framers of the Code naturally expected the courts to interpret it liberally so as to effectuate the public purpose, and to pour content into it on a case-by-case basis." Id. at 543. The Court stated:

> The intent of the clause is not to erase the doctrine of freedom of contract, but to make realistic the assumption of the law that the agreement has resulted from real bargaining between parties who had freedom of choice and understanding and ability to negotiate in a meaningful fashion.

Id. at 544. In Kugler, the price, aside from being two and a half times the market price, the Court found that most of the goods purchased were worthless for the purpose in which they were contracted for.

Unlike the plaintiffs in *Cox*. Plaintiffs here have shown no adverse consequences from the fact that Ms. Ochipinti was not a certified [sic] Ochipinti's failure to disclose that she was not a certified stenographer adversely affected them. Additionally, the mere fact that the transcripts were not in a specific form does not support a showing of ascertainable loss.

Under these circumstances, plaintiffs have failed to demonstrate any loss of the sort for which the Consumer Fraud Act is designed to provide protection.

Contrary to Defendant's contention, Courts are able to make a determination as to whether or not prices are "unconscionable." However, this does not equate to a necessity for the Courts to do so. Such a determination is made on a case-by-case basis. A fact-finder could determine that the price charged by Esquire was excessive and amounted to an unconscionable charge. Moreover, the punitive type of sanction mandated under the Consumer Fraud Act in an action instituted by an individual consumer would be inappropriate in a context such as this.

In the present case. Plaintiff disputes certain invoice charges received by Defendant, Plaintiff contends that these charges were hidden and unreasonable. Aside from the alleged hidden charges, Plaintiff states that Defendant's charges are unreasonable compared to the relevant market prices for similar services. Plaintiff has not demonstrated what the relevant market price is for similar services that Defendants provided. Courts have found a distinction between consumer fraud and mere customer dissatisfaction. *Turf Lawnmower Repair, Inc. v. Bergen Record Corp.*, 139 N.J. 392, 417 (1995).

Due to the fact that this motion to dismiss must be analyzed in a similar manner to a summary judgment motion, all facts must be viewed in a light most favorable to the non-moving party. Although

this Court finds that the alleged violations by Defendant do not equate to per se violations of the CFA, such is a determination more properly left for trial. There remain several issues that either require further discovery, or must be decided by a trier of fact. To dismiss Plaintiff's CFA counts would be premature. As such, many of these issues must be more fully developed and explored. These issues include, but are not limited to the following:

1. The relationship between Quigley and Esquire and what rights does Quigley have against Esquire if there is no direct relationship; this result would touch on whether or not there was a contractual breach by Esquire.

2. Other than monetary loss, how was Quigley impaired or adversely affected by the transcripts, i.e. what were the actual adverse consequences of the transcripts not being produced in a manner that is acceptable under CSR regulations. Factual disputes exist concerning how the charges were allegedly hidden, and unreasonable. If amount billed is ascertainable loss (*Cox*), unless constituting a CFA violation, amounts billed are not necessarily a loss. To determine whether or not the actions of Esquire constitute CFA violations is a matter than [sic] cannot be disposed of or decided under this motion.

3. Unconscionability of industry standard: what is the established standard, i.e.

common practice? Other cases supporting what the industry standard is?

4. To what extent was there deception and/or omission to Quigley and what duty did Esquire owe to Quigley in terms of disclosing information. Further, did Quigley have a duty to inquire into process, standards, and qualifications prior to Esquire's transcribing or was it Esquire's duty to initially disclose.

5. Consumer fraud v. consumer dissatisfaction: although excessive prices fall within the purview of CFA, excessive prices are not per se violations of CFA and are determined on a case-by-case basis.

If the Court had not granted Defendant's motion to dismiss based upon the Supremacy Clause, Plaintiff's CFA claims would withstand the motion to dismiss as there are disputed issues of material fact and law, and a plenary hearing would be required. However, as the Court has determined that the Supremacy Clause applies in this matter, Plaintiff's CFA claims, which rely upon Defendant's violations of state statutes cannot proceed.

CLASS ACTION

This Court will not make a determination on the adequacy of class allegations but an application is governed by Rule 4:32-1 which states:

Rule 4:32-1. Requirements for Maintaining Class Action

(a) General Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class. In order for a class to be certified all requirements of R. 4:32-1(a) must be satisfied as well as one of the three requirements set forth in R. 4:32-1(b). It is not necessary that the requirements of (b)(1), (2) and (3) all be met. Rather, one of these three alternative requirements needs to be met for class certification.

R. 4:32(b) provides:

(1) the prosecution of separate actions by or against individual members of the class would create a risk either of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The factors pertinent to the findings include: first, the interest of members of the class in individually controlling the prosecution or defense of separate actions; second, the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; third, the difficulties likely to be encountered in the management of a class. *R.* 4:32-1(b).

On a motion under *R.* 4:32, the factual allegations of the plaintiff's complaint must be accepted as true for the purpose of determining whether a class should be certified. See *Olive v. Graceland Sales Corp.*, 61 N.J. 182, 189 (1972) (Holding that the merits of a complaint are not involved in the determination as to whether a class action may be maintained). The plaintiff's chances of prevailing on the merits are not relevant to the maintainability decision. *Delgozzo, supra*, 266 N.J. Super. 169, 180-181 (App. Div. 1993). As stated above, under R. 4:32-1(a), the party seeking class certifications must

satisfy four prerequisites: numerosity, commonality, typicality, and adequacy of representation.

The numerosity requirement of R. 4:32-1(a)(1) demands that the class is so numerous that joinder of all members is impracticable. "Impracticability does not mean impossibility but only the difficulty or inconvenience of joining all members of the class." *Harris v. Palm Springs Alpine Estates, Inc.*, 329 F.2d 909, 913-914 (9th Cir.1964). In order to satisfy the numerosity requirement, the "precise enumeration of the member of the class is not necessary." *Zinberg v. Washington Bancorp, Inc.*, 138 F.R.D. 397, 405 (D.N.J.1990). It is permissible to estimate class size. *In re ORFA Securities Litigation*, 654 F. Supp. 1449 (D.N.J.1987). Courts have held that joinder of 40 or more class members will satisfy the numerosity requirement of R. 4:32-1(a)(1). See *Steward v. Abraham*, 275 F.3d. 220, (3d. Cir. 2001):

No minimum number of plaintiffs is required to maintain a suit as a class action, but generally if the named plaintiffs demonstrate that the potential number of plaintiffs exceeds 40, the first prong of Rule 23(a) has been met. See 5 James Wm. Moore et al., Moore's Federal Practice §§23.22[3][a] (Matthew Bender 3d ed. 1999) Id. at 226-27.

R. 4:32-1(a)(2) requires that there be questions of law or fact common to the class, "although not all questions of law or fact raised need be in common." *Weiss v. York Hospital*, 745 F. 2d. 786, 808-809 (3d Cir. 1984), cert. denied, 470 U.S. 1060 (1985). A single

common questions [sic] is sufficient for the commonality prerequisite to be met. *Delgozzo, supra,* at 185. The issue of commonality is satisfied if there are some questions of law or fact common to the class. *Vargas v. Calabrese*, 634 F.Supp. 910, 918 (D.N.J.1986).

R. 4:32-1(a)(3) requires that the claims or defenses of the representative parties be typical of the claims or defenses of the class. The New Jersey Supreme Court has stated that "the claims of representatives must have the essential characteristics common to the claims of the class." *In re Cadillac*, 93 N.J. at 425. "A named plaintiff's claims are typical if they arise from the same event or course of conduct' as those of the class generally." *Zinberg, supra*, 138 F.D.R. at 407. The court must examine whether "the named plaintiff's individual circumstances are markedly difference [sic] or . . . the legal theory upon which the claims are based differs from that upon which the claims of other class member [sic] will perforce be based. *Id.* at 407. (Quoting *Eisenberg v. Gagon*, 766 F.2d 770, 786 (3d. Cir.) cert. denied sub. nom. *Wasserstrom v. Eisenberg*, 474 U.S. 946 (1985).)

R. 4:32-1(a)(4) provides that an adequate class representation depends upon two factors, first, the plaintiff's attorney must be qualified, experienced, and generally able to conduct the proposed litigation and two, the plaintiff must not have interest antagonistic to those of the class. *Zinberg, supra*, 138 F.D.R. at 407-408. Courts in New Jersey presume that the plaintiffs will fairly and adequately represent the interests of the class. See *Delgozzo*, 266

N.J. Super. at 188. The burden is placed on the defendant to prove that the plaintiffs and their counsel are inadequate. *Id.* at 188. See also *Gross v. Johnson & Johnson*, 303 N.J. Super. 336, 342 (Law. Div. 1997) (The last requirement of R. 4:32-1(a)(4) that the plaintiffs is [sic] presumed in New Jersey courts, and the burden is on the opposing party to demonstrate that the proposed representation will be inadequate).

PREREQUISITE SATISFACTION

Once the prerequisites of *R.* 4:32-1(a) are established, the court must find that the action satisfies one of the three subparagraphs of *R.* 4:32-1(b).

Under Subsection (b)(2):

> the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole

R. 4:32.1(b). Plaintiffs state that four years have passed since the New Jersey Supreme Court declared the KGMA Board election process was illegal under *Fox*. Also, following the *Willis v. KGMA* litigation, KGMA has still refused to correct the process. Therefore, the opportunity to correct the election process has elapsed.

To sustain class certification under (b)(2), the plaintiff must be seeking injunctive relief; that is, the court's equitable powers must be invoked. *Barnes v. The American Tobacco Company, supra, 161 F.3d. at 142.* If the relief sought is entirely or predominately damages, then (b)(2) certification is inappropriate. *Reilly v. Gould, supra, 965 F.Supp. at 601.*

A (b)(2) class must be cohesive in order to meet the requirement that the defendant has acted or refused to act on grounds generally applicable to the class. *6A Fed. Proc. L.Ed. § 12:198 (1989).* "While 23(b)(2) class actions have no predominance or superiority requirements, it is well established that the class claims must be cohesive." *Barnes v. The American Tobacco Company, supra, 161 F.3d at 143;*

The requirement that the class be cohesive is regarded as the "vital core" of a (b)(2) class. *Wetzel v. Liberty Mutual Ins. Co., 508 F.2d 239, 251 (3d Cir.1975),* cert. denied by *421 U.S. 1011, 95 S.Ct. 2415, 44 L.Ed.2d 679.* Cohesiveness requires a certain "homogeneity" of the claims of the class members. *Santiago v. City of Philadelphia, supra, 72 F.R.D. at 627.* This "homogeneity" of class member claims has been described as the "essence" of a (b)(2) class action. 1 Newberg and Conte, supra, at § 4.20, p. 4-71. As a result, the courts are more reluctant to certify a (b)(2) class certification than a (b)(3) certification when individual issues are present. *Santiago v. City of Philadelphia, supra, 72 F.R.D. at 628.*

Plaintiff is correct in stating that Courts of equity routinely award money damages under class actions. Kolstad v. Dental Association, 527 U.S. 526, 533-534 (1999). The fact that this case may result in money damages does not in itself destroy the equitable nature of the action. Further, Defendant is incorrect in stating that the classes lack cohesiveness solely because the primary damages are monetary. As Plaintiff points out, each class would be tied to a specific wrong by Defendant. However, no certification has been made regarding class, and it would be premature to decide whether the class could be certified, and meet the requirements of R. 4:32-1. Further, as Defendant's motion to dismiss is granted based upon the Supremacy Clause argument, the class action would therefore not survive.

CONCLUSION

Having considered the briefs of Plaintiff, Defendant, the State of New Jersey Attorney General's Office, as well as the Amicus Briefs submitted by the State Board of Shorthand Reporters, the Court has come to the following decision. Although this Court has done an analysis of Plaintiff's CFA violations, and determined that a plenary hearing would be required, the Court granted Defendant's motion with regards to the Supremacy Clause.

In that respect, as this Court has found that the State of New Jersey regulations with regards to Certified Shorthand Reporters cannot trump the

Federal rules. The "industry standard" that Plaintiff alleges has been violated cannot move forward as Defendant was not required to proceed within the purview of these statutes. Plaintiff does not allege that Defendant violated any Federal Rules, but only that Defendant violated the CFA based upon violations of State statutes. As the Court is granting Defendant's motion to dismiss based upon the Supremacy Clause, it follows that Plaintiff's claims under the CFA and for class action must also be dismissed.

Although no parties have discussed or even raised the issue, the Court raises the issue of whether or not District Courts throughout the country have a set of rules to follow, or whether each individual district has their own set of rules and procedures, i.e. has Congress established a universal set of rules covering all District courts or is each Court responsible for establishing their own rules.

SUPREME COURT OF NEW JERSEY
C-457 September Term 2009
064852

JOSEPH QUIGLEY,

PLAINTIFF-PETITIONER,

V.

ESQUIRE DEPOSITION SERVICES, LLC,

DEFENDANT-RESPONDENT.

ON PETITION FOR CERTIFICATION

(Filed Jan. 21, 2010)

To the Appellate Division, Superior Court:

A petition for certification of the judgment in A-001254-08 having been submitted to this Court, and the Court having considered the same;

It is ORDERED that the petition for certification is denied, with costs.

WITNESS, the Honorable Stuart Rabner, Chief Justice, at Trenton, this 19th day of January, 2010.

/s/ Stuart Rabner
CLERK OF THE
SUPREME COURT